present case you necessarily start with an obligation on the owner of the property to provide a staircase which shall be safe so far as he by reasonable care and inspection can secure. The duty and the right thence emerging are different in the two cases, because, although there is no contractual right between a member of the public using the staircase and the landlord, yet the right which is vested in the member of the public does arise out of the contract which has been entered into between the tenant and the landlord, it being an implied condition of that contract that those visiting the tenant shall have access to the tenant by a staircase which is reasonably safe and secure.

There were several English cases cited to us. In these the facts were ascertained. As regards the position of a child and an adult, I venture to refer to what I have said in the case of *Stevenson*. Unless fault on the part of a defender is the proximate cause of the accident, then whether the person injured is an adult or a child he is not liable.

I regret having been obliged to go into the questions of law, which I should rather have left over until the facts were ascertained. For the reasons stated I am of opinion that the order for proof made by the Sheriff-Substitute should stand, and that the case should go back.

LORD SKERRINGTON—I agree with Lord Mackenzie in thinking that as a matter of averment and pleading the pursuer has said all that is necessary in order to entitle him to an inquiry into the facts.

I further agree with the observations which Lord Mackenzie has made in regard to the legal principles applicable to cases of this kind. But I desire to reserve my opinion upon one question, namely, whether it is strictly accurate to say as a general proposition of law that the duty of the person who has control of premises is precisely the same towards adults whom he permits to use his property as it is towards children. I may refer to the opinion of Lord Atkinson in the case of *Cooke* v. *Midland Great Western Railway of Ireland*, [1909] A. C. 229, at p. 238, where he states that "the duty the owner of premises owes to the persons to whom he gives permission to enter upon them must, it would appear to me, be measured by his knowledge, actual or imputed, of the habits, capacities, and propensities of those persons."

As regards the question whether this case should be tried by a jury or not, I agree with both your Lordships in thinking that it ought to be tried by a Judge, but I desire to say that I come to this conclusion merely upon the specialties of this particular case and in view of the fact that there is a difference of opinion among the Judges of this Court as to the legal principles which ought to be applied. I do not think that there is anything in this particular type of action which ought to deprive a pursuer of his statutory right to have his case tried by a jury.

LORD JOHNSTON was not present.

The Court repelled the defenders' objection to the relevancy, sustained their motion to retransmit the cause, disallowed the issue, recalled the Sheriff-Substitute's interlocutor of 29th October 1913 in so far as it assigned a diet of proof; *quoad ultra* affirmed said interlocutor, and remitted the cause to him to proceed as accords.

Counsel for Pursuer — A. M. Mackay. Agents—Hill Murray & Brydon, S.S.C.

Counsel for Defenders — Horne, K.C. — Jameson. Agents — Boyd, Jameson, & Young, W.S.

Saturday, January 10.

SECOND DIVISION.

[Lord Skerrington, Ordinary.

EDINBURGH PARISH COUNCIL *v.* LOCAL GOVERNMENT BOARD FOR SCOTLAND.

Poor—Recourse—Lunatic Pauper—Removal of Pauper from Scotland to England—Appeal to Local Government Board—Competency—Poor Law (Scotland) Act 1898 (61 *and* 62 *Vict. cap.* 21), *sec.* 5, *sub-secs.* (1) *and* (2).

The Poor Law (Scotland) Act 1898 (61 and 62 Vict. cap. 21) enacts, section 5, sub-section (1)—"Whenever any parish council shall have obtained, in terms of the Poor Law Removal Act 1862, a warrant for the removal from any parish in Scotland to England . . . of any English-born . . . poor person who has not acquired a settlement by residence in Scotland, and to whom the immediately preceding section does not apply, such poor person, if he or she shall have resided continuously in such parish for not less than one year before the date of the application for relief (her deceased husband's residence, if necessary, being reckoned as part of her residence in the case of a widow), may, within fourteen days after intimation of the granting of such warrant, and of the right to appeal in this sub-section mentioned, appeal to the Local Government Board, which Board shall, without delay, investigate the grounds of such appeal, and determine whether it is reasonable and proper that such poor person should be so removed. The inspector of poor of the parish whence the poor person is proposed to be removed shall be bound to intimate to the poor person the granting of the warrant and the right of appeal; and no warrant in terms of the Poor Law Removal Act 1862 shall be carried out until the expiry of the said fourteen days, or, if an appeal is taken, until it has been disposed of by the Board." Sub-section (2)—"In the case of a poor person as in the preceding sub-section mentioned, the inspector of poor shall also be bound to send by registered letter a notice to the clerk of the board of guardians of the union or

parish in England . . . named in the warrant of removal, that if they desire they may, within fourteen days after receipt of such notice, appeal to the Local Government Board against the removal, and shall with such notice transmit a copy of the depositions taken before the sheriff granting the warrant; and if the board of guardians shall so appeal, the Local Government Board shall, without delay, investigate the grounds of such appeal, and determine whether it is reasonable and proper that such poor person shall be so removed. No warrant in terms of the Poor Law Removal Act 1862 shall be carried out until the expiry of the said fourteen days, or, if an appeal is taken, until it is disposed of by the Board."

Held that an appeal to the Local Government Board against a warrant for the removal of a pauper lunatic was competent, in respect that the word "resided" in sub-section (1) was used in its ordinary sense as equivalent to "lived," and was not qualified by the word "intelligently."

Poor—Poor Removal Act 1862 (25 *and* 26 *Vict. cap.* 113), *sec.* 2—*Warrant for Removal of Pauper from Scotland to England—Findings by Sheriff—Relevancy.*

The Poor Removal Act 1862, section 2, enacts that a warrant for the removal of a pauper from Scotland to England granted in terms of the Act "shall contain the name and reputed age of every person ordered to be removed by virtue of the same, and the name of the place in . . . England . . . where the . . . sheriff or justices shall find such person to have been born, or to have last resided for the space of . . . three years in the case of a poor person to be removed to England. . . ."

In a petition to a Sheriff for a warrant under the Poor Removal Act 1862, section 2, for the removal of a pauper, which set forth that the pauper "was born in . . . London, (or) last resided for three years in the parish of Falkland, in Fife," the Sheriff so found.

Observed (*per* Lord Dundas) that the Sheriff's finding of a three years' residence in the parish of Falkland was irrelevant, in respect that the residence for three years specified in the section for the case of a removal from Scotland to England was a residence in England and not in Scotland.

The Poor Law (Scotland) Act 1898 (61 and 62 Vict. cap. 21), section 5, sub-sections (1) and (2), are *quoted in rubric.*

The Poor Removal Act 1862 (25 and 26 Vict. cap. 113), section 2, is *quoted in rubric.*

The Parish Council of the City Parish of Edinburgh, *pursuers*, brought an action against (1) The Local Government Board for Scotland, Edinburgh, and also for any interest that they might respectively have in the premises, (2) Mrs Elizabeth Buckle or Scott, care of Mrs Isabella Lumsden, Freuchie, in the parish of Falkland; (3) The Parish Council of the said parish of Falkland; and (4) the Guardians of the Poor of the Union of St Pancras, in the City of London, *defenders*, for declarator that a warrant or order granted by the Sheriff of the County of Fife, at Cupar-Fife, on the 16th day of May 1911, at the instance of Lawrence Reid, Inspector of Poor for the Parish of Falkland, for the removal, under the provisions of the Poor Removal Act 1862, of the said Elizabeth Buckle or Scott to the Union of St Pancras, was properly obtained, and is a good and valid warrant for such removal, and that the defenders the Local Government Board for Scotland have no power to interfere with the operation of the said warrant by virtue of the provisions of the Poor Law (Scotland) Act 1898 (61 and 62 Vict. cap. 21), or otherwise, and that the said warrant may be put in force notwithstanding any minute or order of the said Board bearing to be made under the provisions of section 5 of the said Act; and for reduction of (*first*) a minute or order of the said Local Government Board for Scotland, dated 4th August 1911, purporting to determine, in accordance with the provisions of section 5 of the said Poor Law (Scotland) Act 1898, that it was not reasonable or proper that the said Elizabeth Buckle or Scott should be removed from the parish of Falkland to St Pancras Union, and to sustain accordingly an appeal at the instance of the Board of Guardians of the Union of St Pancras against her removal; and (*second*) a minute or order of the said Local Government Board for Scotland, dated 20th May 1912, by which the Board purported to further determine, in terms of powers alleged to be conferred on them by the proviso to section 5 of the Poor Law (Scotland) Amendment Act 1898, that the expense of maintenance of the said Elizabeth Buckle or Scott should be borne as from the 4th August 1911 by the Parish Councils of Edinburgh and Falkland in the proportions of 36-40ths by the parish of Edinburgh, and of 4-40ths by the parish of Falkland. . . .

The Local Government Board were the only compearing defenders.

The pursuers averred, *inter alia*—"(Cond. 5) Within the area forming the parish of Edinburgh, which is under the administration of the pursuers, there is situated the Royal Edinburgh Asylum, to which insane persons are admitted in considerable numbers from all parts of Great Britain and Ireland. It thus happens that persons who are not natives of, and who have not acquired any settlement in the parish of Edinburgh, live for prolonged periods within the bounds of the parish in said asylum. Questions have arisen between the Local Government Board and the pursuers as to how far, if at all, the provisions of sections 4 and 5 of the Poor Law (Scotland) Act 1898 are applicable to persons of English or Irish birth who have not acquired any settlement in Scotland, but who, as certified lunatics following upon a warrant of the Sheriff, have been inmates of the said Royal Edinburgh Asylum. There are also cases in which insane persons are boarded out in parishes in Scotland in virtue of the

provisions of the Lunacy Acts applicable to Scotland, and questions have arisen between the Local Government Board and the pursuers as to whether the provisions of the sections before mentioned are applicable to such persons under circumstances of which the case hereinafter dealt with is typical. (Cond. 6) A case with which the pursuers question the power of the Board to deal as falling within the scope of the provisions referred to is that of Mrs Elizabeth Buckle or Scott, a pauper lunatic who recently became chargeable to the parish of Falkland. She was born in London, and became chargeable in Leith in June 1871. Being then a lunatic, she was removed to the Royal Edinburgh Asylum. The parish of St Cuthbert's admitted liability in respect of her husband's residential settlement. From 3rd February 1885 to 25th February 1885 she was boarded out by that parish as a pauper lunatic at Kennoway, Windygates, Fifeshire. From 25th February 1885 to 11th August 1903 she was boarded out also as a pauper lunatic in the parish of Kettle, Fifeshire, and thereafter, from 11th August 1903 until May 8th 1907, at Freuchie, Falkland. Her husband died in Leith in October 1906. On 8th May 1907, her son having intimated that he would in future support her, her name was taken off the pauper roll, and on 30th May 1907 she was struck off the books of the General Board of Lunacy. From 1st May 1907 until 11th August 1910 she continued to be boarded at the expense of her son at Freuchie, in the parish of Falkland, she being, however, during all that period of unsound mind. Owing to the death of her son, and failure of other means of support, the person with whom she was boarded applied to Falkland Parish for relief, which was afforded, and on 10th November 1910 the Poor Law Authority of Falkland made a claim on the pursuers, liability for which the pursuers denied. The Parish Council of Falkland thereupon applied for and obtained a warrant from the Sheriff of the County of Fife and Kinross, sitting at Cupar-Fife, dated 16th May 1911, authorising, in terms of the Poor Removal Act of 1862, the removal of the said pauper lunatic to the St Pancras Union, London. This is the warrant referred to in the summons. . . . Against the removal thereby authorised the Guardians of the Poor of St Pancras Union lodged an appeal. (Cond. 7) Upon consideration of the appeal the Local Government Board, claiming to act under the provisions of section 5 of the Poor Law (Scotland) Act 1898, by minute dated 4th August 1911, professed to determine that the 'proposed removal of the said Elizabeth Buckle or Scott from the parish of Falkland to St Pancras Union was not reasonable and proper,' and accordingly sustained the appeal of the St Pancras Union Authorities; and by further minute, dated 20th May 1912, the Board further professed, in terms of the powers conferred on them by the proviso of section 5 of the Poor Law (Scotland) Act 1898, to determine that 'the expense of maintenance of Elizabeth Buckle or Scott should be portioned, as from 4th August 1911, between the Parish Councils of Edinburgh and Falkland in the proportions of (1) Edinburgh, $\frac{19}{20}$ths, (2) Falkland, $\frac{1}{20}$ths.' These minutes are the minutes brought under reduction in this action. (Cond. 8) The pursuers contend that the warrant or order granted for the removal of the said Mrs Elizabeth Buckle or Scott under the provisions of the Poor Removal (Scotland) Act 1862 was properly obtained, and that section 4 of the Poor Law (Scotland) Act 1898 was not applicable so as to render the obtaining of the warrant incompetent. They further maintain that the warrant so obtained is not liable to be set aside or otherwise interfered with by the defenders the Local Government Board for Scotland, by virtue of any powers contained in section 5 of that Act or otherwise. The said pauper is not a person falling within the scope either of section 4 or section 5. From 1871 onwards the said pauper was a person of unsound mind, and was in that mental condition during the whole period she was boarded out under guardianship in the said parish of Falkland. The minutes of the Board professing to sustain the appeal of the Board of Guardians of St Pancras Union against the removal order, and the consequent minute professing to allocate the expense of maintenance between the parish of Edinburgh and the parish of Falkland respectively, were *ultra vires* of the said Local Government Board, and are null and void. The pursuers have, however, been wrongfully called upon to make payment of the proportion of the cost of maintenance of the pauper specified as payable by them under said minute, and this action has accordingly been rendered necessary. . . ."

The defenders averred, *inter alia* — "(Ans. 5) Admitted that the Royal Edinburgh Asylum is situated in Edinburgh. Admitted that questions have arisen between the pursuers and these defenders as stated. (Ans. 6) Admitted, under reference to the warrant of the Sheriff dated 16th May 1911, and with the explanation that the pauper in question was married in Edinburgh in February 1867, and that for a month in 1885 she was boarded out in Kennoway Parish, Fife, before being moved to Kettle Parish. Explained that since the raising of the action the Guardians of the Poor of the Parish of St Pancras have ascertained that the pauper in question was born on 5th February 1845 at St Edward's Yard, Kinnerton Street, in the parish of St George, Hanover Square, in the St George's Union. (Ans. 7) Admitted, under reference to the minutes of 4th August 1911 and 20th May 1912. . . . (Ans. 8) Denied that the said pauper is not a person falling within the scope of sections 4 and 5 of the Act of 1898. Admitted that from 1871 onwards she was a lunatic. Denied that the action of the Board complained of was *ultra vires*. Explained that the Board, in the exercise of the discretion conferred upon them by section 5 of the 1898 Act referred to, sustained the appeal of the Guardians of the Poor of the Union

of St Pancras, in the city of London, and apportioned the expense of maintenance of the pauper in question. Explained, further, that pauper lunatics are included in the expression 'poor person' in sections 4 and 5 of the Act of 1898, and that these defenders acted within the powers conferred upon them by said sections when they considered and disposed of the appeal made to them."

The warrant of the Sheriff was as follows:—"*Cupar-Fife, 16th May* 1911.—I, Samuel Beveridge Armour Hannay, advocate, Sheriff-Substitute of the County of Fife, having considered the foregoing petition and certificate, and the deposition of the said Lawrence Reid and the documents produced by him, and having seen and examined the said Elizabeth Buckle or Scott, who refused to be sworn or to make any statement, and having examined into the state of the health of the said Elizabeth Buckle or Scott, Find that the said Elizabeth Buckle or Scott is of the reputed age of sixty-five years; find that the said Elizabeth Buckle or Scott last resided for three years in Freuchie, within the parish of Falkland; find that the said Elizabeth Buckle or Scott has become and is now actually chargeable to the Parish Council of the parish of Falkland, and that the said Elizabeth Buckle or Scott has not acquired and retained a settlement in Scotland; find that the said Elizabeth Buckle or Scott would not suffer bodily or mental injury by being removed as herein ordered: Therefore I do hereby order that the said Elizabeth Buckle or Scott be removed and conveyed to and delivered safely at the workhouse at St Pancras, London, and I do order you, the said Lawrence Reid, inspector of poor, to cause the said person to be so safely conveyed and delivered, and you, the said Guardians of St Pancras, to receive the said person. S. B. ARMOUR HANNAY."

The pursuers pleaded, *inter alia*—"(1) Upon a sound construction of the Poor Law (Scotland) Act 1898, the provisions of sections 4 and 5 thereof not being applicable to the case of English-born or Irish-born persons who are and continue to be lunatics while they live in Scotland, the Local Government Board for Scotland has no right or title to interfere under these sections with warrants, otherwise lawfully obtained, for the removal of such persons under the provision of the Poor Removal Act 1862, and the pursuers are entitled to decree of declarator and to reduction as concluded for."

The defenders pleaded, *inter alia*—"(2) In respect that the expression 'poor person' in sections 4 and 5 of the Act of 1898 includes pauper lunatics, these defenders were entitled to receive and sustain the appeal as condescended on, and are entitled to absolvitor."

The following joint minute was lodged by the parties:—"Christie for the pursuers, and Pitman for the defenders, the Local Government Board for Scotland, concurred in stating that parties were agreed that Mrs Elizabeth Buckle or Scott, the pauper lunatic in question, did not reside in the parish of Falkland for one year during period between the years 1867 and 1871, nor for any part of that period, and craved the Lord Ordinary to dispose of the case accordingly."

On 6th December 1912 the Lord Ordinary (SKERRINGTON) granted decree in terms of the conclusions of the summons.

Opinion.—"The pursuers are the Parish Council of the City Parish of Edinburgh, and the compearing defenders are the Local Government Board for Scotland. The action raises a question of some general interest as to the particular class of cases in which the Poor Law (Scotland) Act 1898 (61 and 62 Vict. cap. 21) has conferred upon the Local Government Board a discretionary power to interfere with parish councils which have obtained a warrant for the removal of a pauper from Scotland to England or Ireland. Prior to 1898 the removal of paupers from one parish in Scotland to another was regulated by section 72 of the Poor Law (Scotland) Act 1845 (8 and 9 Vict. cap. 83). The removal of English and Irish paupers to their native land was regulated by section 77 of the same statute, as amended by the Poor Removal Act 1862 (25 and 26 Vict. cap. 113). It seems to have been considered a hardship both on paupers and on boards of guardians that English and Irish paupers who had resided for a considerable time in Scotland without acquiring a settlement were liable to removal if a sheriff or two justices could be persuaded to grant the necessary warrant. It seems also to have been thought that the law as it stood under the Act of 1845 made it too difficult to acquire a settlement by residence, and further, that in certain cases paupers who had a settlement in Scotland ought not to be removed from the parish where they became chargeable to their parish of settlement. The Act of 1898 was passed in order to remedy these evils. The question in the present case is whether the Local Government Board, acting in the assumed exercise of the powers conferred upon them by the Act of 1898, were entitled to determine that the removal of a pauper lunatic from the parish of Falkland to the Union of St Pancras, London, was unreasonable and improper. The question turns primarily upon the meaning of the word 'reside' as used in sections 3, 4, and 5 of the Act of 1898.

"It has long been settled that 'residence' for the purpose of acquiring a settlement under section 76 of the Act of 1845 is residence by a person who has a certain amount of intelligence. A lunatic, as distinguished from a person of weak mind, cannot acquire a residential settlement. The conditions upon which a residential settlement may be acquired were altered by section 1 of the Act of 1898, which repealed section 76 of the principal Act. It is, however, clear that section 1 of the 1898 Act assumes that its readers are familiar with the Poor Law of Scotland as settled by numerous decisions. Its phraseology is nearly identical with that of section 76, and besides using the word 'resided' once in connection with the acquisition and once in connection with the retention of a

settlement, it uses two expressions to which technical meanings have been attached by decisions, viz., 'continuously' and 'maintained himself.' There is no doubt that it is still the law that residence in a parish by a person of unsound mind will not avail for the acquisition of a settlement in that parish. On the other hand, I do not agree with the argument of the pursuers' counsel to the effect that in every case where the word 'reside' is used in the Poor Law Acts with reference to a pauper, the word necessarily refers to residence by a person who possesses some degree of intelligence. Section 1 of the Act of 1898 and section 76 of the earlier Act show that the word 'reside' may be used in the same section in a popular as well as in a technical sense. So far as I know, it has never been contended in the Court of Session that a pauper lunatic who possessed a residential settlement in a particular parish was incapable of retaining that settlement by continuing to reside in the same parish. The contrary has been assumed in a number of cases, of which I need only refer to a single example — *Keith Parish Council* v. *Kirkmichael Parish Council*, November 8, 1901, 4 F. 76, 39 S.L.R. 100. It seems to me, therefore, that the pursuer's counsel argued his case too high. On the other hand, I agree with him that in any question as to the acquisition of a privilege by virtue of residence, this word, as used in the Poor Law Acts, *prima facie* means residence by a person who is possessed of some intelligence. When one reads the Act of 1898 as a whole, it seems to me clear that this *prima facie* view is actually the sound one. It has been said that the law of settlements is a matter of merely pecuniary interest to parishes, and that it is of no importance to paupers. The opposite is the truth. It may be of vital importance to a pauper whether he is removed from a town where he has lived most of his life and has friends, and is sent to a place where he is a stranger. Equally he has an interest in the question whether, after spending the best part of his life in Scotland, he is to be sent to England or Ireland. Accordingly the law as to the acquisition of a parochial settlement is, in my view, substantially a part of the law of status. As already explained, section 1 of the Act of 1898 makes it easier for a person to acquire a settlement in Scotland, but it still carries forward the long-established rule that a lunatic's residence in a parish will not help him to acquire a settlement. Sections 3, 4, and 5 of the same statute create new and minor privileges which a person may acquire by residence in Scotland even although such residence may not have been sufficient for the acquisition of a settlement. Thus by section 3 a pauper who has resided for a year in one parish may appeal to the Local Government Board against his removal to another parish in Scotland. This clause is conceived in the interest of paupers, because the Board has no power to alter the legal incidence of the burden of maintenance. Again, by section 4 an English-born or Irish-born pauper who has resided for a certain time in Scotland without having recourse to common begging or receiving parochial relief is declared to be irremovable from Scotland. Lastly, by section 5 English-born or Irish-born persons who have not acquired a settlement by residence in Scotland, and who have not acquired what is now popularly called a 'status of irremovability' under section 4, are entitled to appeal to the Local Government Board against a warrant for their removal from Scotland to England or Ireland, provided they have resided continuously in one parish for not less than one year. It will be seen, therefore, that sections 3 to 5 are really part and parcel of the legal reform initiated by section 1 of the same Act, and I have no doubt that the word 'residence' as used in all these sections means residence of a kind which would avail to acquire a settlement — in other words, residence by a person who is not of unsound mind. It is none the less true that every one of these sections applies to persons who are lunatics as well as to persons who are sane. It is of no importance whether a pauper is or is not of unsound mind at the time when the question arises whether he has a settlement by residence, or may appeal against an order for his removal to another parish, or against a warrant for his removal to England or Ireland, or whether he is irremovable from Scotland. Whether he is sane or insane, the only question is whether his residence in Scotland was of the kind contemplated by the particular section under which he claims to benefit. I recognise the force of the argument that the equitable restrictions upon the right of removal introduced by the Act of 1898 are a separate chapter in the Poor Law Code, and that in this chapter the word 'reside' should be construed in its ordinary as distinguished from its technical sense. I find it impossible, however, to dissociate sections 3 to 5 from section 1. Further, section 4 is expressed in the same technical language as section 1, and its phraseology supports the view that the scheme of legal reform contained in the statute must be regarded as forming one integral whole. The language of sections 3 and 5 is much less technical and significant than that of section 4, but they each contain a provision which suggests that the word 'residence' is used in something different from the merely popular sense. I refer to the parenthesis which allows a widow to tack on the period of her residence as a wife. This clause seems intended to exclude a technical rule of the Poor Law which might otherwise have been thought applicable.

"The pauper was born in London in 1845. She was married in Edinburgh in 1867 to a man who had a residential settlement in the parish of St Cuthbert's. She became chargeable in Leith in 1871 as a pauper lunatic, and she was maintained as such by the parish of St Cuthbert's from 1871 till May 1907. From that time until August 1910 she was boarded at the expense of a son at Freuchie in the parish of Falkland, her name having been taken off the pauper roll. Owing to the death of her son she recently became chargeable to the parish of Falkland,

which thereupon applied for and obtained a warrant from the Sheriff of Fife and Kinross authorising her removal to the Union of St Pancras, London. The Guardians of this Union lodged an appeal, and the Local Government Board determined that the proposed removal of the pauper was 'not reasonable and proper.' Although the pauper had resided in the parish of Falkland for many years before she became chargeable to that parish, her residence there must in my opinion be disregarded upon the ground of her mental incapacity, which has continued without a break from 1871 to the present time. There is nothing, however, in the pleadings to show that she may not have resided continuously in the parish of Falkland for a year sometime between her marriage in 1867 and the date when she became a lunatic. While I agree with the pursuers' construction of the statute, I do not propose to give facilities for the removal to England of a woman whose husband had a settlement in Scotland, and who has lived in this country for more than forty years, more particularly in view of the fact that the Local Government Board has determined that such removal would not be reasonable and proper. Accordingly I shall continue the case in order that the pursuers may take one or other of two courses. They may, if they choose, submit evidence to the Local Government Board to the effect that the pauper did not reside in Falkland Parish for a year between 1867 and 1871, and thereafter if the Board is against them the pursuers may amend their pleadings and ask for a proof. Alternatively the pursuers may move for a re-hearing of the case in order to argue that when section 5 of the Act of 1898 speaks of residence in a parish 'for not less than one year before the date of the application for relief' it means 'immediately before' such application, and that accordingly it is irrelevant to inquire into the earlier history of the pauper. It must, however, be understood that decree will not be pronounced as concluded for unless I am satisfied that it is justified either by the facts or by the law of the case. If the Local Government Board state that after considering the evidence they are satisfied that the pauper did not reside in Falkland Parish between 1867 and 1871 for the requisite term, I shall of course accept their statement."

The defenders reclaimed, and argued—The appeal to the Local Government Board was competent. The Poor Law (Scotland) Act 1845 (8 and 9 Vict. cap. 83), sec. 77, the Poor Removal Act 1862 (25 and 26 Vict. cap. 113), and the Poor Law (Scotland) Act 1898 (61 and 62 Vict. cap. 21), sec. 5, formed a code which regulated the removal of paupers. The code applied equally to sane and insane paupers, and the word "reside" when used with reference to the removal of a pauper did not have a technical meaning, but should be interpreted according to its ordinary meaning—*Crawford & Petrie* v. *Beattie*, January 25, 1862, 24 D. 357, *per* Lord Justice-Clerk (Inglis) at 367. Admittedly the word "reside" when used with reference to the acquisition of a settlement by a pauper did have a special technical meaning, but the question in the present case related, not to the acquisition of a settlement by a pauper, but to his removal. Therefore, since the word was not used in a technical sense, but in its ordinary meaning, it included the case of both sane and insane persons. Whether the lunatic had a right of appeal or not under sub-section 1 of section 5 of the Act of 1898, the Board of Guardians named in the notice of removal had a right of appeal under sub-section 2, and if it appealed the Local Government Board had the duty imposed on it of determining whether or not the removal was reasonable and proper on any ground.

Argued for the respondents—The appeal to the Local Government Board was incompetent. The Poor Law (Scotland) Act 1898 dealt with certain conceptions and employed certain language, the meaning of which had been settled by the Court long before the passing of the Act—*Parish Council of Kilmalcolm* v. *Parish Council of Glasgow*, May 29, 1906, 8 F. (H.L.) 12, *per* Lord Robertson at 13, 43 S.L.R. 639, at 640; *Stirling Parish Council* v. *Dunblane Parish Council*, 1912 S.C. 316, *per* Lord Dundas at 325 and 328, 49 S.L.R. 271, at 276 and 277. Sections 1 to 5 inclusive of the Act formed a *catena* of clauses all dealing with one or other aspect of the same matter, and the same meaning must be applied throughout to the word "reside." The meaning which the Court had given to the word excluded the idea of residence by a lunatic—*Melville* v. *Flockhart, &c.*, December 19, 1857, 20 D. 341; *Crawford & Petrie* v. *Beattie* (*cit.*); *Kirkwood* v. *Lennox*, July 10, 1869, 7 Macph. 1027, *per* Lord Deas at 1029, 6 S.L.R. 670; *Keith Parish Council* v. *Kirkmichael Parish Council*, November 8, 1901, 4 F. 76, 39 S.L.R. 100. The principle of settlement by residence was not introduced in England until 1876—Vullaimy, Settlement and Removal (2nd. ed.), p. 2. As to the Poor Removal Act 1862, that Act was a mere machinery statute which did not affect the qualifications necessary to bring a person within the Poor Law (Scotland) Act 1898. Moreover, "residence" had nothing to do with the question of removal at the date of the Act. *Roger* v. *Maconochie*, July 5, 1854, 16 D. 1005, and *Beattie* v. *Leighton & Mitchell*, February 20, 1863, 1 Macph. 434, were also referred to.

At advising—

LORD DUNDAS—The question for decision in this case is as to the competency or the reverse of an appeal to the Local Government Board by the Guardians of an English Poor-Law Union against a warrant pronounced by the Sheriff of Fife ordering the removal of a pauper lunatic from the parish of Falkland to the workhouse of the said union. If the appeal was competent, we have no concern with the manner in which the Board dealt with it. If it was not competent, we must reduce the minutes of the Board. Though the question at issue is thus capable of brief and succinct statement, it is not easy to set forth with brevity one's grounds of decision, and I do not at all com-

plain of the length of the arguments which were presented in order to enable us to arrive at a conclusion.

The statutory provision upon which, primarily at least, the question turns is section 5 of the Poor Law (Scotland) Act 1898. The facts of the case are sufficiently set forth on the record and in the opinion of the Lord Ordinary, and I need not summarise them. It seems to me clear that upon these facts the requisites prescribed by section 5 (1) of the Act, as preliminary to an appeal to the Board, are all here present if one reads the sub-section according to the natural and ordinary meaning of its language. It would appear (*a*) that Falkland Parish Council has obtained, in terms of the Poor Removal Act 1862, a warrant by the Sheriff for the removal of the pauper to England; (*b*) that the pauper was born in England; (*c*) that she has not acquired (or at all events has not retained) by residence a settlement in Scotland; (*d*) that she has not become "irremovable" from Scotland within the meaning of section 4; and (*e*) that she has "resided" continuously, in the ordinary sense of the word, for not less (in fact for much more) than one year in Falkland parish before becoming chargeable there. The arguments from both sides of the bar were presented upon the assumption that the Act of 1898, and in particular section 5 (1), deal with insane as well as sane paupers; and I think this assumption is well founded, looking to the wide words used, "any English-born or Irish-born poor person," and to section 6, where a specialty is dealt with as affecting "the case of a lunatic poor person proposed to be removed to Ireland." And the pursuers are confronted with what seems, *prima facie*, a strange anomaly, in that, though the Sheriff's warrant finds in fact that the pauper "last resided" for three years in Falkland parish, she did not, upon their reading of section 5 (1), "reside" there during the last of these very same years, or indeed at all, because being a lunatic she was incapable of "residence" in the sense in which they say that word has been interpreted by decisions of this Court.

I agree with the Lord Ordinary that the Act of 1898 presupposes an acquaintance not only with prior Poor Law legislation but also with prior decisions of the Court; and I think that when the Act adopts words or phrases which (under the Act of 1845) have been interpreted by decision as bearing a special meaning, it must be held to use them according to that meaning when they occur in a context identical with or similar to that in which they were judicially considered and construed. Now the words "reside" and "residence" as they occur in section 76 of the older Act, with direct relation to the acquisition and retention by a pauper of a residential settlement, have been construed by this Court as connoting, in that context, a certain amount of mental capacity. I think the result of the cases which are binding upon us is (1) that a lunatic cannot acquire a settlement by residence, and (2) that a lunatic fails to retain such a settlement acquired prior to his lunacy if he is *de facto* absent for the statutory period from the parish where he so acquired it. Whether or not the lunatic, though he is in fact resident during the statutory period in that parish, can retain the settlement, is still, I apprehend, an open question. It is not necessary to decide it in this case, but I cannot agree with the Lord Ordinary's observation that "it has never been contended in the Court of Session that a pauper lunatic who possessed a residential settlement in a particular parish was incapable of retaining that settlement by continuing to reside in the same parish." Not only has the contention been maintained, but it has received high judicial sanction and approval, *e.g.*, in *Crawford & Petrie* v. *Beattie*, (1862) 24 D., *per* Lord Justice-Clerk Inglis at p. 368, and Lord Cowan at p. 369, and in *Kirkwood* v. *Lennox*, (1869) 7 Macph., *per* Lord President Inglis at p. 1029, 6 S.L.R. at p. 672. Nor do I agree with the Lord Ordinary when he says that "the contrary has been assumed in a number of cases," of which his Lordship instances (erroneously as I think) as an example that of *Keith Parish Council*, (1901) 4 F. 76, 39 S.L.R. 100.

One must consider, then, whether the construction put upon "reside" and "residence" as the words occur in their context in section 76 of the Act of 1845 has any close or real bearing upon the present question, which relates, not to the acquisition or retention of a settlement by a pauper lunatic, but to his removal from Scotland to England, and the competency of an appeal to the Local Government Board against a Sheriff's warrant obtained to that end. The pursuers' counsel did not argue at our bar—and they stated that they had not argued in the Outer House (though the Lord Ordinary seems to have so understood their argument)—that "in every case where the word 'reside' is used in the Poor Law Acts with reference to a pauper, the word necessarily refers to residence by a person who possesses some degree of intelligence." What I understood to be argued at our bar was that "reside" and "residence" in the Act of 1898, and particularly in section 5 thereof, must be read and interpreted according to the judicial construction put upon those words as they occurred in section 76 of the Act of 1845. Even so put, this contention seems to me rather a violent one. It may well be that that construction would be appropriately applied to the words in question as they occur in section 1 of the Act of 1898, which is *in pari materia* with section 76 of the Act of 1845, but it does not to my mind follow that its application is appropriate to the words as they occur in section 5 of the later Act, which deals with a quite different and separable category of Poor Law administration. The statutory provisions in regard to the removal of paupers from Scotland to England or Ireland, and *vice versa*, seem to me to be quite distinct from the enactments about the acquisition and retention of residential settlements. The legislative code (old and new) in regard to the removal of paupers from Scotland is, I think, contained in section 77 of the Act of 1845, the Poor Law Removal Act 1862, and sections 3 to 6 of the

Act of 1898. As to section 77, one may observe that the words "reside" and "residence" do not occur in it at all; that it was repealed by section 8 of the Act of 1862, "so far as inconsistent with that Act;" and that certain portions of it were specially repealed—I suppose to make things quite clear—by the Statute Law Revision Act 1892. The Act of 1862 was a machinery Act; it was passed to provide "better means . . . for the safe conveyance to the place of their destination in England, Ireland, or Scotland," of paupers who were to be removed. One comes really then to the Act of 1898. The words "any poor person" in section 3 are obviously wide enough to include poor persons who are insane. I do not think any material aid is to be derived from section 4. It creates, under certain circumstances, a status of irremovability from Scotland of an English-born or Irish-born pauper; the proviso certainly seems to refer to paupers who are not lunatics; but it does not follow that the word "reside" is used in two different senses in the same section, though it may apply with different effect to paupers sane and insane respectively. It is, I think, upon section 5 that this matter truly turns, and its whole language, as I read it, concludes the question in favour of the competency of this appeal to the Local Government Board. I see no reason to apply a technical, or any other than the ordinary, meaning to the words "reside" and "residence" as they occur in it. Indeed, if (as I think, and as the Lord Ordinary expressly says that he thinks) the section applies to insane as well to sane paupers, these words must, I take it, be used in their ordinary sense, for they could not in the case of a lunatic be used in any other.

I respectfully think that the Lord Ordinary's conclusion is wrong. He seems to me to have started and proceeded upon a misleading trail. He starts from section 1 of the Act of 1898 as substantially re-enacting (though with variations in the statutory periods) section 76 of the Act of 1845; and he says (rightly, as I think) that "it is still law that residence in a parish by a person of unsound mind will not avail for the acquisition of a settlement in that parish." Thence his lordship proceeds to deduce that "in any question as to the acquisition of a privilege by virtue of residence, this word, as used in the Poor Law Acts, *prima facie* means residence by a person who is possessed of some intelligence"; and after commenting upon the sections of the Act of 1898 down to and including section 5, the Lord Ordinary comes to the conclusion that "sections 3 to 5 are really part and parcel of the legal reform initiated by section 1 of the same Act, and I have no doubt that the word residence, as used in all these sections, means residence of a kind which would avail to acquire a settlement—in other words, residence by a person who is not of unsound mind." His lordship adds—"It is none the less true that every one of these sections applies to persons who are lunatics as well as to persons who are sane." The Lord Ordinary thus bases his judgment upon a construction of the first five sections of the Act of 1898 as a massed whole, into which he imports as an essential element the judicial interpretation of the words "reside" and "residence" as they are used in section 76 of the Act of 1845. His lordship says he finds it impossible to dissociate sections 3 to 5 from section 1. As already observed, I consider that the judicial construction of the words "reside" and "residence," while fairly applicable to section 1, has no necessary nor, I think, justifiable application to other sections of the 1898 Act, such as that with which we are here specially concerned, which deal with quite a different aspect of Poor Law administration; I consider that the "legal reform initiated by section 1" involved two separate and distinct elements, relating respectively to (*a*) acquisition and retention of residential settlements, and (*b*) removal of paupers; and I hold that sections 3 to 5 must, for these reasons and in the above sense, be dissociated from section 1. I am therefore of opinion that we ought to recall the interlocutor reclaimed against, and that the compearing defenders are entitled to absolvitor.

I think it right to add a few words upon a matter which came into prominence during the debate, though it does not actually arise for decision. In the petition to the Sheriff for removal of this pauper to England it is set out that she was born in London, "(or) last resided for three years in the parish of Falkland in Fife;" and the Sheriff's order finds, *inter alia*, that she so resided. It seems to me that a misapplication of the provisions of the Act of 1862, section 2, is here involved. That section enacts that the Sheriff's warrant shall contain, *inter alia*, the name of the place in Scotland, England, or Ireland (as the case may be) where he shall find the pauper to have been born "or to have last resided for the space of five years in the case of a poor person to be removed to Scotland, and three years in the case of a poor person to be removed to England or Ireland." The residence for three years specified for the case of a removal from Scotland to England is, I apprehend, plainly a residence in England, not in Scotland. I think the theory of the Legislature was that inquiry should be made in such case as to the pauper's English place of birth, or the last English residence where he has (or may have) acquired a settlement. The Sheriff's finding in the present case of a three years' residence in Falkland seems to me to be irrelevant, and to lack compliance with the requirements of the statute. This view is borne out by the printed forms which were exhibited to us during the debate, and which I understood to be officially issued for use, as matter of practice, as well as by text writers upon the subject—Guthrie Smith's Poor Law (3rd ed.), p. 274; Graham's Poor Law, p. 312, note. But I need say no more, as it is unnecessary to decide this point, which arose only incidentally during the discussion.

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,