Friday, December 10.

FIRST DIVISION.

[Lord Curriehill.

THE LORD ADVOCATE *v.* BROWN (INSPECTOR OF PARISH OF LIFF AND BENVIE).

"*Industrial Schools' Act,*" 1866, 29 *and* 30 *Vict. cap.* 118—*Order of Committal—Parochial Board.*

A boy whose mother was in receipt of parochial relief was sent, at the request of the mother, upon a magistrate's order of committal under the "Industrial Schools Act, 1866," to a certified industrial school. In an action against the Parochial Board at the instance of the Lord Advocate, representing the Treasury, for reimbursement of the boy's expenses, paid under the Act by the Treasury to the industrial school, the Parochial Board in defence pleaded (1) the invalidity of the warrant, and (2) want of intimation of the proceedings. *Held* (1) that the order or warrant being *ex facie* regular, the Parochial Board could not now dispute it, and (2) that intimation was not necessary.

The Lord Advocate, on behalf of the Commissioners of the Treasury, raised this action against Thomas Brown, Inspector of Poor for the parish of Liff and Benvie, in Forfarshire, and concluded (1) for declarator that the defender, as representing the Parochial Board of the parish, was liable for the maintenance of James Mackay, then detained in the Dundee Industrial School, from the date of the commitment, under warrant dated 8th May 1871, until his discharge; and (2) for payment of £31, 10s., the cost of his maintenance in the school up to the time of the raising of the action, and of whatever further sum should be expended on his maintenance during his detention there.

A boy named James Mackay was, by warrant of one of the magistrates of Dundee, dated 8th May 1871, granted on the application of the boy's mother, ordered to be sent to the Dundee Industrial School, and there detained until he should attain the age of fifteen years. The order was in the form (A) of the second schedule to the Industrial Schools' Act, 1866, and bore to be pursuance of that statute; and it described the said James Mackay as "now or lately residing in Perth Road, Dundee, apparently of the age of eleven years (whose religious persuasion appears to me, after inquiring, to be Protestant), being a child subject to the provisions of section 14 of the said Act."

The provisions of the Act regarding the detention of children in certified industrial schools, in so far as these bore upon the question, are as follows:—Sect. 14 enacts that "any person may bring before two justices or a magistrate any child apparently under the age of fourteen years who comes within any of the following descriptions," viz. (here follow the descriptions). "The justices or magistrate before whom a child is brought, as coming within one of those descriptions, if satisfied on inquiry of that fact, and that it is expedient to deal with him under this Act, may order him to be sent to a certified industrial school." Sect. 18 provides, *inter alia*, that "the school shall be some certified industrial school (whether situate within the jurisdiction of the justices or magistrates making an order or not), the managers of which are willing to receive the child, and the reception of the child by the managers of the school shall be deemed to be an undertaking by them to teach, train, clothe, lodge, and feed him during the whole period for which he is liable to be detained in the school or until the withdrawal or resignation of the certificate of the school takes place, or until the contribution out of money provided by Parliament towards the custody and maintenance of the children detained in the school is discontinued, which ever shall first happen." Sect. 22 provides that "the order of detention in a school shall be forwarded to the manager of the school with the child, and be a sufficient warrant for the conveyance of the child thither and his detention there." Sect 24 provides that an "instrument purporting to be an order of detention in a school, and to be signed by a magistrate, shall be evidence of the order." Sect. 35 authorises the Commissioners of Her Majesty's Treasury from time to time to contribute, out of money provided by Parliament for the purpose, such sums as the Secretary of State shall from time to time recommend towards the custody and maintenance of children detained in certified industrial schools. Sect. 38 provides that "in Scotland where a child sent to a certified industrial school under this Act is at the time of his being so sent, or within three months then last past has been chargeable to any parish, the parochial board and inspector of the poor of the parish of the settlement of such child, if the settlement of the child is in any parish in Scotland, shall, as long as he continues so chargeable, be liable to repay to the Commissioners of Her Majesty's Treasury all expenses incurred in maintaining him at school under this Act, to an amount not exceeding five shillings per week;" and in default of payment, those expenses may be recovered by the Inspector of Industrial Schools, or any agent of the inspector, in a summary manner, before a magistrate having jurisdiction in the place where the parish is situate. Sect. 51 provides, *inter alia*, that "in Scotland the Summary Procedure Act, 1864, shall apply to all offences, payments, and orders in respect of which jurisdiction is given to justices or a magistrate by this Act, or which are by this Act directed to be prosecuted, enforced, or made in a summary manner, or on summary conviction."

James Mackay having been sent to the Dundee Industrial School, which was a certified industrial school under the Act, on 8th May 1871, under the order already mentioned, had been maintained there at the expense of the Commissioners of the Treasury, who now sought to recover expenditure in respect of the liability imposed on parochial boards by section 38 of the Act.

It was admitted by the defender that Alexander Mackay, the child's father, who died in 1869, had at his death an industrial residential settlement in the parish of Liff and Benvie, and that his widow, who was left with four pupil children, received parochial relief from that parish from her husband's death, at rates varying according to her circumstances, until July 1871, when further help was refused.

The Parochial Board resisted the action, on the

ground that the original warrant was *ab initio* null and void, and that the provisions of the statute had not been complied with. They averred *inter alia* that the warrant had been obtained on the mere verbal application of the mother, who did not claim that her boy fell under any of the descriptions specified in the 14th section of the Act, and the order did not state that he fell under any of these descriptions; that neither the defender nor the Board were parties to, nor had they received intimation of, any application regarding the boy, nor of his detention or the rate of his maintenance, until a demand for repayment was made. They further expressed themselves ready to bring reduction or a suspension of the proceedings founded on in the action.

The defender pleaded—"1. The declaratory conclusions of the action are incompetent, and the petitory conclusion being dependent on the declaratory, the action should be dismissed. 2. The order of detention here founded on cannot support the claim here attempted to be enforced against the defender's Board, in respect that—(1) The provisions alike of the common law and of the Summary Procedure Act, as condescended on, were not respected or conformed to. (2) There was no good instance in the applicant, and no qualifications in the boy asked to be detained. (3) The order was *ultra vires* of the magistrate who pronounced it. (4) It was granted without evidence of necessary grounds. (5) It does not state which of the alternative facts set out in the 14th section of the Act was found proved. And (6) Is, as regards the defender and his Board, *res inter alios acta*. 3. The magistrate acted illegally in not sending the said James Mackay to a poorhouse, as allowed by the 19th section, with a view to inquiries being made as to his antecedents. 4. The order was illegal in respect that the defender was not called as a party to the proceedings before the magistrate. 5. The claim here made against the defender's parish cannot be sustained, in respect that James Mackay was not at the date of the application for an order of detention a pauper chargeable to that parish, and has not continued such. In any view, such chargeability must be held to have ceased at 4th July 1871. 6. The amount claimed as the expenses incurred by the Treasury is not correct, it being excessive, as explained by the defender. 7. Decree cannot be granted as regards the future liability of the defender's Board, and *quoad hoc* the action should be dismissed."

The pursuer, *inter alia*, pleaded—"3. No relevant defence having been stated, and, in particular, it being incompetent, at least in the present process, to review the foresaid order of committal, the pursuer is entitled to decree, with expenses.'

The Lord Ordinary pronounced the following interlocutor:—

"*Edinburgh*, 14*th January* 1875.—The Lord Ordinary having heard the counsel for the parties, and considered the closed record and whole process, repels the first plea in law for the defender, and appoints the cause to be enrolled for further procedure, reserving all questions of expenses.

"*Note.*—The first defence stated by the defender is that the declaratory conclusions of the action are incompetent, and that as the petitory conclusion is dependent on the declaratory, th action should be dismissed. This defence, as explained at the debate, is maintained in respect of the provision in section 38 of the Act already quoted, by which the expenses of the Treasury are authorised to be recovered in a summary manner before a magistrate by the Inspector of Industrial Schools, and which, it is maintained, excludes all other process for recovery of such expenses. It is obvious that the summary jurisdiction thus conferred upon magistrates (under which term are included county justices, police judges, and burgh magistrates) is not well adapted for trying important and difficult questions of settlement which may arise, and as the jurisdiction of this Court is not excluded by the terms of the enactment, either expressly or by necessary implication, I am of opinion that the commissioners are not precluded from trying in the present form the liability of the defender, whose first plea in law must therefore be repelled.

"But the defender further maintains that the order of detention cannot support the pursuer's claim, in respect of certain objections which he states to the regularity of the proceedings which resulted in the order being granted. These are numerous, and are all set forth in the 2d, 3d, and 4th pleas in law for the defender. It appears to me, however, that unless and until that order is set aside in a regular manner and by a Court of competent jurisdiction, the order must, under sections 22 and 24 of the statute, be regarded as sufficient to support the claim of the pursuers if the child is truly chargeable to the defender's parish. I understand from what passed at the debate that the defender is prepared, if necessary, to institute such proceedings as may be competent and necessary for having the order set aside.

"The defender further pleads that, assuming the order to be unobjectionable in regard to form and regularity, the child was truly not chargeable to the Parochial Board, at all events from and after the time when his mother ceased to be a recipient of parochial relief in July 1871, and is not now chargeable; and that in no view can the claim of the Commissioners be sustained to any extent beyond the expense of maintaining the child from 8th May to that date. This is a question of fact as to which the parties are not agreed, and which will probably require to be cleared up by proof, unless it can be settled by mutual admissions. It was stated in the course of the debate that the Inspector of the Industrial Schools, on 4th July 1871, gave notice to the defender or his parish that Mackay had been sent to said schools on the order already referred to, and that the parish would be held liable for the expense of the maintenance. Whether and what effect the receipt of that notice and the failure of the Parochial Board then to repudiate liability may have on this present defence, is a question on which it is premature at present to say anything.

"I have appointed the case to be enrolled, in order that the defender may state whether he desires the present proceedings to be sisted for a reasonable period, to enable him to take such proceedings as he may be advised are competent to him for setting aside the order, or by stating whether he desires a proof of his averments as to chargeability. The *onus* of establishing the non-chargeability of the child appears to rest upon the defender, as the child was at the date of the

order, or at all events for three months previous thereto, chargeable to the parish, as being the pupil child of a man who had died with a residential settlement in the parish, and whose widow was unable to maintain her children and was in receipt of parochial relief."

Procedure in this action was thereafter sisted upon an action of reduction of the magistrate's order being brought by the defender against the pursuer. In that action the Lord Advocate stated preliminary pleas against satisfyiug the production, which were repelled.

The Lord Advocate then reclaimed in both processes, and was allowed at the discussion to amend his 3d plea in law in the action at his instance, which then ran thus—"The said James Mackay having been, within the meaning of sections 35 and 38 of the statute libelled, sent to and detained in a certified industrial school, the pursuer is entitled, whether the warrant for the said James Mackay's detention be valid or invalid, to recover from the defender the sums contributed by the Commissioners of Her Majesty's Treasury towards his custody and maintenance."

He argued—The Treasury had no concern with the proceedings before the magistrate, and could not supervise these. The warrant was *ex facie* conform to the Act. The fact that the Parochial Board was not called did not vitiate the warrant. The inspector should have known the fact of the boy's commitment.

The Parochial Board argued—The case did not fall under the "Industrial Schools Act" alone, and the procedure was not conform to common law and the Summary Procedure Act. The school managers should have seen this, and the loss should be laid on them. The Inspector of Poor had no cognisance of the matter, and the Board could not therefore be made liable.

At advising—

Lord President—In this case the Lord Advocate, on behalf of the Commissioners of the Treasury, concludes for declarator against the Parochial Board of Liff and Benvie, to have it found that the Board is liable "for the expense of maintaining, at a rate not exceeding five shillings a week, James Mackay, presently detained in the Dundee Industrial Schools," from the date of his commitment until his discharge, and further for payment of £31, 10s., as being the amount of the expenditure advanced for his maintenance.

It appears that this boy when eleven years of age was, on 8th May 1871, after having been brought before a magistrate and been found to be within the classes recognised in "The Industrial Schools Act, 1866," sent to the "Dundee Industrial Schools." The warrant under which the boy was sent there is admittedly *ex facie* complete. The age as stated is within the provisions of the 14th section, and it is further set forth that he shall be kept in the schools until he shall attain the age of fifteen. The warrant is precisely in terms of the schedule appended to the Act, and further, the 52d section says that when an order of commitment is made in terms of the schedules it shall be deemed sufficient. Everything had been regular and under that order; the boy has been educated, and recently, although not discharged, we are told he has been allowed to work outside. He must now have reached the age of fifteen in the course of the year about to expire.

The authority which the Commissioners of the Treasury have for advancing money to "The Industrial Schools" is contained in the 35th section of the Act. They are authorised "from time to time to contribute, out of money provided by Parliament for the purpose, such sums as the Secretary of State from time to time thinks fit to recommend towards the custody and maintenance of children detained in certified industrial schools, provided that such contributions shall not exceed 2s. per head per week for children detained on the application of their parents, stepparents, or guardians." Then there is a provision in the 38th section that if a child at the time of his being sent to the school is chargeable to any parish, or has been so within three months previously, then during his detention, so long as he remains so chargeable, the Parochial Board of the parish of his settlement shall be liable to reimburse the Treasury their expenses for his maintenance and education to an amount not exceeding 5s. per week. On that section the present action is laid. There is no dispute that Liff and Benvie is the parish of this boy's settlement. If the boy was chargeable at the time sent, and has continued so, there is no question that that is the parish which is liable. There is, in my opinion, no doubt that he was chargeable to the parish when sent to the school, though there may be a doubt whether he continued so all along, but this latter point need not now be considered. His father was dead, his mother was in receipt of parochial relief, chiefly because she was burdened with the support of several children. So far the case is quite clear, and all the conditions of the statute have been fulfilled.

But a number of defences have been stated by the Parochial Board against the validity of the warrant of commitment, and these are all objections which do not appear on its face. The Industrial School directors therefore, on receiving the warrant, saw that *ex facie* it was all correct, and, in my humble opinion, they were entitled to act upon it and keep the boy in terms of it. So, too, the Treasury Commissioners, finding the boy in the school under a warrant *ex facie* regular and valid, were entitled to advance money on the faith of these facts, and are now entitled to recover it if they can bring the case within the 38th section of the statute. All the defences stated I hold to be utterly irrelevant. Above all, the objection that is taken by the Board that they were not parties to the proceedings which terminated in the issuing of a warrant is totally untenable. When an application is made by the Procurator-Fiscal to have a child sent to an industrial school, it is no doubt indispensable to call that party, if there be any one, whom it is intended to make primarily liable for the expenses of maintenance and education. The proper person to call and hold liable is the father or mother or other guardian of the child, with whom it may be living. Here is a case where the mother was present when the order was granted; she was quite unable to maintain her child; she was a pauper, and it was altogether useless to bring her into the field and charge her with the maintenance of the child. The mother being a party, it was unnecessary to call any one else. The Parochial Board say that they

should have been cited, because they would then have had an opportunity of getting the warrant set aside or suspended on the grounds on which they now allege it to be incompetent.

It appears to me that the Poor Inspector must know where the paupers on the roll live, how they are situated, and what are the individual circumstances of each. Here is a woman with several children receiving relief from the Parochial Board, the amount of which it seems varied at different times according to the change in her circumstances. Thus it was reduced when her eldest daughter had grown up and was able to help her. It is the duty of a public body who administer funds for the relief of the poor not to expend these funds except in the full knowledge of the circumstances of each pauper, and after proper consideration. The child of a pauper cannot be sent away to the keeping of another without its being known to the inspector. Such a circumstance is enough to vary the allowance which the Board makes, and not a shilling of the ratepayers' money should be spent without full cognisance of the facts of the particular case.

Such knowledge ought in the present instance to have put the Parochial Board of Liff and Benvie in the position, that if they had an objection to make to the magistrate's order, they should have applied for a recall thereof, or should have set it aside in a suspension. They knew that the child being that of a pauper, they would be bound to pay for its maintenance under the Industrial Schools Act. They omitted to take the course that was open to them, and it is quite out of the question to allow them to do so now. I therefore, without hesitation, hold that the defences, in so far as they are directed against the validity of the warrant, are irrelevant.

But there remains this question. The boy's mother, though a pauper when he was sent to the industrial school, ceased to obtain relief from the 4th July 1861; if after that she was in a condition to maintain herself and her family, including the boy, she was no longer a pauper, and therefore sums expended by the Treasury would not be recoverable from the Parochial Board. Now, from the time the boy was sent to the industrial school till 1871 the mother was chargeable to the parish, and the Parochial Board are in any event liable during that period.

Lord Deas—The warrant, upon which this boy was sent to the Industrial School, is not said to be otherwise than *ex facie* regular and legal. This being so, I am of opinion we must hold the managers of the Industrial School were entitled to act upon it; and although perhaps they were not bound, still it was their duty, if they had room, to admit the boy into the school, and they did so. There was no obligation upon them further than that of seeing that they were proceeding upon an *ex facie* regular document.

As regards the Treasury, I do not think it was incumbent upon them to do more than see that the warrant was right and regular in the same way. They had no further duty in the matter than the managers of the Industrial School.

It does not, however, follow that it was not the part of any one to inquire into the validity of this warrant, for it was possible it might not be legally valid, although *ex facie* good. The duty of so doing fell upon that party who was to be ultimately liable without relief, and that party was the inspector of the Parochial Board. He was entitled to have had the warrant quashed. Of course he could not effect this unless he had knowledge of the matter. But I hold that there is strong ground for thinking that express intimation was made to him. Without going into the general question whether the inspector of the Parochial Board is bound to know the condition of the paupers in his parish, I agree with your Lordship in the chair in thinking that what took place necessitates the inference that the inspector knew where the boy was. He was therefore in a position to know the state of matters, and yet he made no question or complaint. I quite agree in the result at which your Lordship has arrived.

I do not understand that it was admitted on the part of the Crown that there was anything wrong with this warrant. Their contention was that in a question with them an inquiry into the validity of the warrant was incompetent. Mr Fraser maintained that the warrant was not valid, but that raises a different matter. I think the pursuer's plea a sound one.

Lord Ardmillan—I so entirely agree with your Lordships that I have nothing to add. This boy was lawfully sent, by a magistrate entitled to do so, to an industrial school. He was the son of a poor woman who certainly at that time was a pauper.

I cannot say that I think any notice was necessarily due to the Inspector of Poor in this case. There is no doubt that in December 1869 the Inspector of Poor considered the case of this woman and her children and the amount of relief afforded was reduced from time to time according to the number of children who were dependent on her for support. He had four different opportunities for considering the position of this woman's family. So that ignorance of the history of this boy on the part of the defender cannot be maintained.

Although there had been errors committed in the granting of this warrant, if these were not *ex facie*, and such as to justify the school in refusing admittance, I do not think the defender is entitled to prevail.

On the whole matter I entirely concur with your Lordships.

Lord Mure concurred.

The Court pronounced the following interlocutor:—

"The Lords having heard counsel on the reclaiming note for the Lord Advocate against Lord Curriehill's interlocutor, dated 18th June 1875, Recal the said interlocutor: Find that the second, third, and fourth pleas stated in defence are irrelevant: Repel these and all the other defences: Find that the defender, as representing the Parochial Board of the parish of Liff and Benvie, is liable for the expense of maintaining James Mackay, mentioned in the summons, in the Dundee Industrial School, from 8th May 1871 till 16th April 1873; And, in respect of the joint-minute for the parties, No. 19 of pro-

cess, decern against the defender for payment to the pursuer, on behalf of the Lords Commissioners of Her Majesty's Treasury, of Twelve pounds twelve shillings and sixpence sterling, being the amount of such expenses, with interest from the date of citation. *Quoad ultra* assoilzie the defender, and decern: Find no expenses due to or by either party."

Counsel for Pursuer (Reclaimer)—Lord Advocate (Gordon) — Dean of Faculty (Watson)—J. P. B. Robertson. Agent—J. A. Jamieson, Crown-Agent.

Counsel for Defender—(Respondent)—Fraser—Thoms. Agents—Drummond & Reid, W.S.

Friday, December 10.

FIRST DIVISION.

[Lord Craighill.

THOMSON *v.* GREENOCK HARBOUR TRUSTEES.

Reparation—Harbour Trustees—Liability—Negligence—Ship.

After a ship had discharged her cargo it was discovered that her keel was injured, and a large stone was found in the berth which she had occupied when discharging her cargo. The owners of the ship averred that the injuries had been caused by the said stone, and raised an action of damages against the harbour trustees.—*Held* (1) that to establish liability against the harbour trustees, negligence on their part, or on the part of their servants, must be proved; and (2) (*diss.* Lord Ardmillan) that on the evidence the pursuers had failed to establish that the injury to the ship was caused by the said stone.

This action was raised by Alexander Thomson against the Greenock Harbour Trustees to recover damages for an injury said to have been caused to a vessel belonging to him while lying in the defenders' dock. The pursuer averred that the injury was caused by a large stone lying in the bottom of the dock, on which the ship settled down as the tide fell. The case turned chiefly on questions of fact, the only question of law being whether it was necessary to prove fault or negligence by the Harbour Trustees. A proof was led, the import of which will be seen from the Lord Ordinary's note and the opinions of the Judges.

The Lord Ordinary pronounced the following interlocutor:—

"*Edinburgh, 9th April* 1875.—The Lord Ordinary having heard parties' procurators on the closed record, proof, and productions, and having considered the debate and whole process, in the first place, Finds, as matter of fact, that the pursuers have failed to prove that the injuries to their ship, the 'Albatross,' damages for which are sued for in the present action, were received in the East India Harbour at Greenock, the *locus* libelled on the record: In the second place, finds, *separatim*, as matters of fact, (1) that the East India Harbour of Greenock is and always has been a tidal harbour; (2) that the wharf in that harbour to which the 'Albatross' was moored in July 1874, when, as the pursuers allege, the said injuries were received, was formed in the spring of 1873; (3) that after the said wharf was completed — that is to say, between the spring of 1873 and the end of August 1873—the bottom of the said harbour, to the extent of 150 feet outward and southward from the front of the said wharf, was deepened by dredging to the depth of four feet below the eight feet which previously had been the depth of water in that part of the harbour at low water mark of ordinary spring tides; (4) that in the course of and immediately after the close of these dredging operations the said portion of the harbour thus deepened was examined by a diver, that stones or other hard substances, if such there were, not lifted in the process of dredging, by which injuries might be caused to vessels taking the ground at low water, might be discovered and removed; (5) that these dredging operations and the subsequent examination and clearing of the bottom were performed by experienced and efficient workmen under the supervision of the harbour engineer and harbourmaster, who also were persons fully qualified, by reason of their skill and experience, for discharging the duties with which respectively they were entrusted; and nothing occurred in the course of the execution of the said work, or between its completion and the time when the injury to the 'Albatross' is said by the pursuers to have been received, which suggested or was calculated to suggest that the said work had not been properly performed, or that the said portion of the harbour in front of the said wharf was, in consequence of a stone or stones having been left upon the bottom, unsafe for the berthage of ships, or that the time had come when a renewed examination of the bottom of this part of the harbour ought, as a measure of reasonable precaution, to be ordered by the defenders; (6) that the stone by contact with and pressure upon which the said injuries to the 'Albatross' are alleged by the pursuers to have been produced, is a mooring-stone, artificially prepared, and there is nothing in the proof showing or any way indicating the time when it was lowered or thrown into the said harbour; and (7) that the presence of the said stone in the harbour was neither known to nor suspected by the defenders prior to the time when they were informed by the pursuers that the injuries, reparation of which is now sued for, had been received by the 'Albatross:' Finds, as matter of law, that the facts being as set forth in the seven foregoing findings, the defenders, even on the assumption that the injuries received by the said ship were caused by contact with and pressure upon the said stone in the East India Harbour of Greenock, are not liable in damages, nothing constituting fault or negligence on their part having been established: Therefore sustains the defences, assoilzies the defenders from the conclusions of the summons, and decerns: Finds the defenders entitled to expenses, of which allows an account to be given in, and remits that account when lodged to the Auditor for his taxation and report.

"*Note.*—The pursuers are the owners of the ship 'Albatross,' and sue the defenders, the