

Tuesday, January 31.

FIRST DIVISION.

[Lord Fraser, Ordinary.]

M'COLL v. BEATTIE (INSPECTOR OF POOR OF BARONY PARISH).

*Poor—Poor Law Amendment Act 1845 (8 and 9 Vict. c. 83), secs. 86 and 59—Competency of Action.*

A man having been assaulted and injured by an inmate of a pauper lunatic asylum on 20th August 1878, brought an action in the Court of Session in June 1881 for damages in respect thereof against the Parochial Board, whose property the asylum was. *Held* that this was an "action on account of" something "done in the execution of this Act," within the meaning of the 86th section of the Poor Law Amendment Act 1845, and that as such it was excluded by the limitations of actions imposed by the said section.

Duncan M'Coll, a police sergeant, raised an action of damages against Peter Beattie, as inspector of poor of the Barony Parish of Glasgow, concluding for a sum of money as damages and *solatium* in respect of personal injury. The Woodilee Asylum, near Kirkintilloch, the inmates of which are exclusively pauper-lunatics, belonged to the Parochial Board of the said parish. The pursuer averred—“(Cond. 3) On the forenoon of the 20th day of August 1878, the pursuer, while on the public or servitude road leading from Waterside to Lenzie Station, and in the discharge of his duty as sergeant of police aforesaid, was brutally attacked, assaulted, and maltreated by a dangerous and able-bodied lunatic, an inmate of said asylum, and in the charge and under the control of the said Parochial Board, who was at the time at large and unattended, and whose name the pursuer has been informed is Patrick Meath or Muth.” The pursuer then detailed the method of the attack made upon him, the nature of the injuries which he sustained, and the effects thereof, which he alleged to be permanent upon his physical system and his prospects of livelihood. He then averred—“(Cond. 9) The foresaid injuries and disablement of the pursuer were caused by and through the culpable negligence and gross carelessness of the said Parochial Board, or of those acting for them or for whom they are responsible, who had the charge, keeping, and custody of the foresaid lunatic, in permitting him to be at large and unattended. The pursuer believes and avers that at the time he sustained the foresaid injuries the number of attendants at the said asylum was not sufficient for the proper and necessary care and control of the inmates thereof, and that since the occurrence the number of attendants has been increased, and other necessary precautions adopted to prevent the recurrence of such an outrage.”

The action was originally directed also against William Babbie, as clerk to and representing the Dumbartonshire Commissioners of Supply, and concluded for payment of a certain allowance in terms of the rules and regulations issued by the Secretary of State for the government of the Dumbarton County Police under the Act 20 and

21 Vict. c. 72. The case, however, as against this defender having been dismissed by the Lord Ordinary, was not insisted on by the pursuer in the Inner House.

By the Poor Law Amendment Act 1845 (8 and 9 Vict. cap. 83) it is enacted, section 59—“That in every case in which any poor person who shall have become chargeable in any parish or combination shall be insane or fatuous, the parochial board of such parish or combination shall, within fourteen days from the time when such person is declared or known to be insane or fatuous, provide that such insane or fatuous person be conveyed to and lodged in an asylum or establishment legally authorised to receive lunatic patients.” Section 86 enacts—“That all actions on account of anything done in the execution of this Act shall be brought before the Sheriff Court, and every such action shall be commenced within three calendar months after the fact committed, and notice in writing of such action and of the cause thereof shall be given to the defender one calendar month at least before the commencement of the action.”

The defender pleaded—“(1) The action is incompetent, and excluded under sec. 86 of the Act 8 and 9 Vict. c. 83.”

The date of signeting the summons in the action was 13th June 1881.

The Lord Ordinary (FRASER) dismissed the action, sustaining Beattie's first plea-in-law above quoted.

His Lordship's opinion was as follows—“The ground of action against the Parochial Board is that the Parochial Board were guilty of culpable negligence and gross carelessness in permitting a lunatic to be at large and unattended, whereby he was enabled to commit the assault upon the pursuer from which his health has suffered. Assuming that this was a good ground of action, it is now too late to insist in it, and this by reason of the provision in the 86th section of the Poor Law Amendment Act, which enacts that ‘all actions on account of anything done in the execution of this Act shall be brought before the Sheriff Court, and every such action shall be commenced within three calendar months after the fact committed, and notice in writing of such action and of the cause thereof shall be given to the defender one calendar month at least before the commencement of the action.’ Now, the injury complained of took place on the 20th of August 1878, and the present action, raised in June 1881, is therefore not in time, nor is it brought in the appropriate Court.

“The section of the statute has been made the subject of judicial construction in several cases. It has been determined, on the one hand, that it applies to cases where wrong has been done by a person while acting in the performance of official duties such as might form the foundation of an action for reparation at the instance of the party aggrieved—*Mackay v. Chalmers*, 5th February 1859, 21 D. 443; *Knox v. Montgomery*, 7th June 1865, 3 Macph. 890—while, on the other hand, it has been held inapplicable to cases on contract arising between an individual and the parochial board as such—*Mackay v. Beattie*, 19th July 1860, 22 D. 1486. The enforcement of contracts may be sought for by action in any Court without restriction as to time, and without the preliminary notice required by the section of the Act. But

the present case does not come within that class. It no doubt is distinguishable from all others that have occurred in this, that the damages are sought, not on account of anything done—which is the language of the Act—but on account of something omitted. The Parochial Board are charged with lax administration in not providing for proper control over a dangerous lunatic, whereby one of the lieges suffered injury, and this is not within at least the letter of the statute, which, to be complete, should, along with the words *anything done*, also have said *or omitted to be done*, in the execution of the Act.

“In construing the statute the Court have in preceding cases given it a fair and reasonable interpretation. Thus, while it gives protection to acts done in the execution of the Act, this has been held to mean things not done in execution of the Act though professing to be so. The statute assumes that a wrong has been done, which, if excusable, ought to be protected, seeing that things really done in execution of the Act required no protection. Dealing with the Act in this spirit, the Lord Ordinary is of opinion in the present case that an act of omission, such as is here charged against the Parochial Board, must be dealt with in the same way as an act of commission, which is expressly provided for.” . . .

The pursuer reclaimed.

At advising—

LORD PRESIDENT—This action of damages is directed against Peter Beattie, inspector of poor of the Barony Parish of Glasgow, on behalf of and as representing the Parochial Board of that parish; and the defender pleads that this being an “action on account of something done in the execution of this Act, it ought, under the 86th section of the Poor Law Amendment Act, to have been brought within three calendar months after the fact committed,” and in the Sheriff Court, not in the Court of Session. I am of opinion that this plea is well founded. The first answer to it which was attempted to be maintained was that this was not something “done” in the execution of the Act, but rather something omitted to be done—the defenders having failed to exercise sufficient precaution in the supervision of these lunatics; but I am of opinion, looking to the pursuer’s averments of fault and negligence, that this answer cannot be maintained. The inmates of this establishment are all pauper lunatics, and the asylum is under the charge of the Parochial Board. The pursuer, it appears, was assailed by a dangerous and able-bodied lunatic inmate who was “at large and unattended,” and the pursuer further alleges that at the time “the number of attendants at the said asylum was not sufficient for the proper and necessary care and control of the inmates thereof.” The meaning of that averment is that the Parochial Board under section 59 of the statute so managed their lunatic paupers as not to have sufficient control over them, and that so the accident occurred. It seems to me that the control and arrangement of pauper lunatics are duties in the execution of the Act—duties which the pursuer says the Board exercised negligently and inefficiently—and that thus the action is one directly under the 86th section of the Act. But it was further contended for the pursuer that this was not a case under the Poor Law Acts at all, but under the Lunacy

Acts. But the pursuer has not shown any section in the Lunacy Acts giving authority to the Parochial Board to build an asylum and send pauper lunatics to it. This is a large parish, with a very large number of paupers, and it became necessary to build a separate and sufficient building for their pauper lunatics, and this the Parochial Board accordingly did, under authority from the Board of Supervision. They had no statutory authority for doing so except section 59 of the Poor Law Act; but they built this building, and, as the pursuer says, kept it in such a negligent and careless manner as to allow of the accident which befel him. I see no reason to doubt that the action falls under section 86 of the Poor Law Amendment Act, and ought therefore to be dismissed.

I may add a word in reference to a plea stated in argument for the pursuer, to the effect that owing to the nature of the injuries sustained by him from this assault he was in such a condition as to be unable to raise his action, or even to instruct counsel or agents, within the period of one calendar month prescribed by this 86th section. I cannot think that plea, even if it had been well averred, would have avoided the necessity for applying the 86th section. It would not have justified the pursuer bringing his action in a wrong Court, and further, he ought, in any view, to have raised it as soon as he was in a condition to do so, whereas this summons was not signeted till 13th June 1881, the assault having been committed on 20th August 1878.

LORD DEAS and LORD MURE concurred.

LORD SHAND—I am of the same opinion, and have only to add, that even if the pursuer had succeeded in showing us that some of the Lunacy Acts authorised parochial boards to build houses specially for pauper lunatics, I think this would still have been a parochial matter, and the 86th section would have covered even that case.

The Lords adhered.

Counsel for Pursuer—Scott—Baxter. Agents—J. & J. Galletly, S.S.C.

Counsel for Defender (Beattie)—Burnet—Ure. Agents—Mackenzie, Innes, & Logan, W.S.

Wednesday, February 1.

## SECOND DIVISION.

[Lord M'Laren, Ordinary.

COOK v. COOK AND OTHERS.

(Before Lords Young, Craighill, and Rutherford Clark.)

*Succession—Heritable and Moveable—Conversion—Power of Sale.*

A truster in 1858 by a *mortis causa* deed conveyed his estate to trustees with directions to sell. The settlement was in form ineffectual to convey heritage, but the truster's heir conveyed the heritage to the trustees for the purposes of the trust-deed, giving them merely a power of sale. *Held*, in a question arising subsequently to the heir's death between the heir and a singular successor in the heritage who had acquired it from the trustees, that