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 Rutherfurd 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

the estate having been converted by the truster, and that conversion being unaffected by the terms of the heir's subsidiary conveyance, the heir-at-law had no title to sue a reduction of the deeds of conveyance to the singular successor.

Finlay Cook, who at one time resided in Liverpool and subsequently in Arran, died leaving a will dated 13th July 1841, whereby he appointed his brother Alexander and certain others his executors and trustees, and directed them, or the survivor of them, to sell and dispose of his estate either by public auction or private contract, as they or he should think necessary, and call in and receive all such debts or sums of money as should be owing to him at his death, and place the money arising by such sale, and money so called in, on good and sufficient security, to be applied to the maintenance and education of his son and daughter, Archibald and Mary Cook. Finlay Cook was survived by three children, viz., the said Archibald and Mary Cook and Finlay Cook junior, who died intestate in 1863. This will was expressed in such a manner that it did not in the Scottish form convey heritable estate. Accordingly, Archibald Cook, as his father's heir-at-law and eldest son, executed on 27th March 1858 an assignation whereby, on the narrative that his father had not validly conveyed the heritable property in Scotland belonging to him, and that he was willing to supply this defect so far as lay in his power, he conveyed to his father's trustees and the survivor of them, in trust always for the ends and purposes mentioned in the last-mentioned will and testament of his father, and not otherwise, and with power of sale to the trustees if by them considered necessary, his whole right and interest in the Scottish heritage which had belonged to his father, viz., certain leasehold subjects therein contained. Archibald Cook died on 20th March 1865 intestate, and survived by his widow and by three sons and two daughters, and thereafter the beneficial interest in the leasehold property came to be vested in his sister Mary Cook and his children in equal shares, the rents of which continued to be duly collected by the trustees. On the death of the said Alexander Cook, who was one of Finlay Cook's trustees, the sole surviving trustee, the Reverend Archibald Nicol, entered into a negotiation with Mary Cook in pursuance of an alleged family arrangement. By an assignation dated 27th day of June 1867 he conveyed to her the one-half *pro indiviso* of these subjects in which Archibald's children were interested, in consideration of a sum of £43, 6s. 8d., which *in cumulo* amounted to £350 sterling, as the value of his share of the said leasehold subjects, which had been valued at £700, paid to him as trustee in cash, and further in consideration of a discharge of debts alleged to be due by the trust to Mary for money advanced to her brother Archibald, and stated to have been vouched for to the trustee's satisfaction. Thereafter on 30th May 1873 Mary Cook, through her factor and commissioner, conveyed the subjects to Mrs Blair, residing in Saltcoats, at the upset price of £650.

The present action was raised by David Cook, residing in the island of Arran, as eldest son and heir-at-law of the deceased Archibald Cook, against Mrs Blair. In it the pursuer sought to have reduced (1) the assignation dated 27th June 1867 in favour of Mary Cook; (2) the conveyance by the latter to Mrs Blair dated 30th May 1873; and (3) he sought to have his right declared to the leasehold subjects conveyed in these deeds.

He pleaded—"(1) The pursuer being proprietor of the whole, or in any view of one-half, of the said leasehold subjects, is entitled to decree in terms of one or more of the conclusions of the summons. (2) The defender having purchased in the knowledge of the pursuer's rights, and of the fact that the seller had no title, the pursuer is entitled to decree as concluded for."

The defender replied that though Finlay Cook's will did not carry the leasehold subjects in question in respect of its lacking sufficient disponing words, yet that Archibald had ratified it by his assignation in 1858, and that thereby the subjects were vested in the trustees. Further, the direction to sell if "they shall think necessary" which was contained in the will operated conversion of the leasehold into moveable estate, so far at least as regarded the beneficiaries under the will. Further, that any right which the pursuer might have was a right to call the said Reverend Archibald Nicol or his representatives to account.

He pleaded—"(1) The pursuer has no title to sue. (4) The deeds sought to be reduced having been granted for just and onerous causes by persons *in titulo* to grant the same, the defender is entitled to absolvitor from the whole conclusions of the summons."

The Lord Ordinary (M'Laren) found that the pursuer had no title to sue, and therefore dismissed the action.

His Lordship's opinion was as follows:—"Finlay Cook, the pursuer's grandfather, left a will, dated 13th July 1841, purporting to dispose of his whole estate on trust for sale and division of the price. The will being in point of form insufficient to convey heritable estate, the defect was supplied by the deed of his son and heir Archibald, who on 27th March 1858 conveyed the heritable leasehold property possessed by his father to the trustees in trust for the uses and purposes of the will. On the death of Archibald and his brother Finlay Cook junior the beneficial interest in the leasehold property came to be vested in his sister Mary and Archibald's children in equal shares. In pursuance of an alleged family arrangement, the surviving trustee, by the first of the deeds libelled, conveyed to Mary the one-half *pro indiviso* of these subjects in which Archibald's children were interested, in consideration of a sum of £43, 6s. 8d. paid to the trustee in cash, and of a discharge of debts alleged to be due by the trust to Mary for money advanced to her brother Archibald, and stated to have been vouched to the trustee's satisfaction. By the third deed libelled, Mary Cook, through her factor and commissioner, conveyed the subjects to the defender. The pursuer claims the one-half of the property derived from his father, on the ground of inadequate consideration, and that the trustee was not entitled to sell.

"As already stated, Finlay Cook's will contained a trust or direction to sell, and his son's conveyance in implement was a conveyance for this trust, the power of sale being ancillary to the direction contained in the regulating deed. By the effect of the trust for sale the property was, in my opinion, constructively converted from heritable to moveable; and the right to challenge

the exercise of the power of sale is therefore (if such right exists) vested in the personal representatives of the truster, and not in the heir-at-law. This circumstance is, in my opinion, sufficient for the decision of the present action."

The pursuer reclaimed, and argued—He was entitled to sue as his father's heir-at-law, and to reduce the sale of the leasehold property in question. The trustee had no right to convey it away to his prejudice. It was said that the property was constructively converted from heritable to moveable, and that thereby the right to challenge the exercise of the power of sale was vested in the trustee's personal representatives; but (1) the clause in the deed of 1858 was a mere power given to the trustees to sell if they thought necessary, and could not of itself operate conversion—*Auld* v. *Anderson, &c.*, Dec. 8, 1876, 4 R. 211; and (2), even if it could have that effect, the fact that Archibald survived his father, and treated his share of the heritage for years as heritage, drawing the rents therefrom, operated re-conversion—*Grindlay* v. *Grindlay's Trustees*, Nov. 9, 1853, 16 D. 27.

The defender replied—The pursuer had no title to sue. Any right of challenge was alone vested in the trustee's personal representatives. The deed of 1858 executed by Archibald was not an alteration on, but in aid of, his father's informal deed. It contained a distinct power of sale, if the trustees thought necessary, which operated constructive conversion of the property from heritable to moveable. No limitation was made on this power by the words "if they thought it necessary." But further, there was a *bona fide* sale of the subjects granted by the trustee, who was vested in them at the time, and the disponee was thus able to give the defender a good title. If action was to lie against anyone, it was not, then, against the defender, but against the trustee.

At advising—

Lord Young—In this case I agree with the Lord Ordinary, who thinks that this leasehold property was by the will of Finlay Cook converted into personal estate—that is, with respect to the interest of the beneficiaries under his will. Archibald Cook, the heir-at-law, gave effect, necessarily or not (I assume necessarily), to his father's will by a deed—the construction, intention, and meaning of which, in my opinion, was to aid and not alter it. The power given to the trustees to sell, if they thought necessary, does not interfere with the rule of conversion operated by the father's directions to sell. That being so, Archibald Cook's right under his father's will, being a right to personal estate, passed to his personal representatives, and not to his heir-at-law; and therefore the pursuer has not the right, title, or interest, which he has put forward to set aside the disposition of the property by the trustee to Mary, and the sale by her to a third party, or further, to have his right declared to the property belonging to her. It does not belong to him, and probably that is sufficient to dispose of the case, and the Lord Ordinary has thought so. But I have no objection to say for myself that I am further of opinion that the purchaser has a good title. I think the surviving trustee did sell and convey the trust property to Mary Cook. He may be liable in an action for the way in which he did so, though I have no doubt he acted in good faith, but he did sell to Mary for £350. The property was of the value of £350, and he was accountable for that sum, as the trustee administering the trust estate.

I do not think the purchaser has any concern with whether the trustee got the £350, or whether he simply gave credit for it, or in what shape he took it; but the trustee sold the property and conveyed it to Mary Cook, and is thus put in the position of being liable as a trustee to an action for £350 at the instance of the beneficiaries under the trust.

Therefore I am of opinion that the purchaser here has a good title, and I should, for my own part, be rather disposed, instead of simply resting our judgment on the plea sustained by the Lord Ordinary, further to sustain the defences, repel the reasons of reduction, and assoilzie the defenders from the conclusions of the action.

Lord Craighill—With regard to the plea sustained by the Lord Ordinary, I am inclined to agree with your Lordship that the Lord Ordinary is right.

The grandfather's settlement not being effectual to affect heritage in Scotland in 1858, his son Archibald ratified this settlement and then died in 1865 intestate. Archibald's father was possessed of certain leasehold subjects, which in his settlement he conveyed to his trustees to be sold in order that the proceeds should be divided among the beneficiaries named in the deed. The effect of this direction as ratified by Archibald appears to me to be that this property was constructively converted from heritage into moveables, and the heir-at-law would have been cut out. That would certainly have been the effect of the grandfather's will if it could have affected heritage. But it is said that the grandfather's will was incapable of affecting heritage, and although it was apparently validated by Archibald's subsequent deed, still it was not validated to the full extent, as the power of sale was limited in that deed to the case of the trustees thinking a sale necessary. I concur with your Lordship that the deed of 1858 put no limitation on the powers or duties of the trustees. It bears to be granted that the trustees of the grandfather might carry out the ends, uses, and purposes of his will, and although the power of sale is stated to be "if thought necessary," I do not think that alters or limits the provisions of the grandfather's will. The deed is expressly stated to be in aid of the directions in the will of 1841. That is sufficient for the decision of the case, and it is not necessary to say more; but we have had an argument on the other pleas, and like your Lordship I am quite ready to pronounce judgment on them also.

If we are to take the pursuer's own interpretation of the deed granted in aid, I would still hold that there had been an exercise of the power of sale.

In the next place, the pursuer says—"If there was a *bona fide* sale, then it is all right, but when the disposition to Mary Cook is looked at it is evident there was no sale." I think there was a sale, and the disposition having been granted by the trustee vested in the subjects at the time, the disponee was able to give the defender Mrs Blair a good title. I therefore concur with your Lord-

ship that the interlocutor should be recalled in order that we may enlarge the ground of judgment.

LORD RUTHERFURD CLARK concurred.

The LORD JUSTICE-CLERK was absent.

The Lords therefore recalled the interlocutor of the Lord Ordinary, sustained the defences generally, and assoilzied with expenses.

Counsel for Reclaimer — Solicitor-General (Asher, Q.C.) — M'Kechnie. Agents — Robert Emslie, S.S.C.

Counsel for Respondent—Trayner—Jameson. Agents—J. & J. Ross, W.S.

Thursday, February 2.

SECOND DIVISION.

[Sheriff of Lanarkshire.

STEWART AND CRAIG *v.* PHILLIPS.

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

Proof—Agreement to Share in Lease of Shootings—Writ—Land-Rights—Innominate Contracts.

Contracts connected with land and innominate contracts of an unusual character can only be proved by writ.

The lessees of a shooting for a term of six years raised action against a person for a share of the rent and expenses of the said shooting, on the allegation that he had agreed to become joint-tenant along with them. *Held* that such an agreement being in truth a lease for a term of years could only be proved by writ.

Archibald Stewart and Robert Paterson Craig, residing in Glasgow, presented a petition in the Sheriff Court of Lanarkshire against John Phillips for the purpose of having him ordained to pay them the sum of £75, 13s. 8d., with interest from 30th April 1880 till paid. The grounds of action as stated by the pursuers were these:—In March 1877 they entered into a partnership or joint-adventure with Alexander Strachan, a commission agent in Glasgow, to take for a period of six years the shootings on the lands of Wester Airdrie and others, commonly called the Cumbernauld estate, Dumbarton. The said shootings were accordingly leased for that period from Mr Burns, the proprietor, the lease being in writing and dated 2d May 1877. Shortly after the lease was entered into they assumed Robert Livingstone as a partner with them in the shootings. Soon after 12th August 1877 Strachan injured his foot so badly that it was arranged that he should look out for someone else to take his place in the partnership. Ultimately John Phillips, the defender, agreed to take Strachan's place, and was accepted as a partner in the month of September 1877 for the unexpired period then to run of the lease, upon condition that he should pay a fourth part of the rent and other annual cost of the shootings. The defender only paid his proportion of the expenses for the seasons 1877-78 and 1878-79, but declined to pay his fourth part of the expenses of the year 1879-80, which the pursuers were compelled to advance and pay for him. These expenses constituted the sum sued for.

The pursuers pleaded — "(1) The defender having entered into the said partnership or joint-adventure along with the pursuers and the said Robert Livingstone, is bound to pay one-fourth part of the cost of the said shootings. (2) The pursuers having advanced and paid on behalf of the defender the sum sued for as his share of the cost of said shootings for the year from 30th April 1879 to 30th April 1880, are entitled to decree against him therefor, with expenses as craved."

The defender averred that he had agreed to take Strachan's place in consideration of paying the latter £40, and in consideration of paying one-fourth part of any additional expense to be thereafter incurred during the season. He duly paid these sums for 1877-78, and also paid similar sums at the end of the next season of 1878-79. In the early part of 1879 he definitely told the pursuers that he could not again join in the shootings. He further, however, offered, out of friendship to Stewart, to pay one-fourth of the expenses, but this offer he withdrew when he found that the pursuers were trying to hold him bound as a joint-tenant for the rest of the lease.

He pleaded—"(1) The action is irrelevant and ought to be dismissed. (2) The pursuers' averments are irrelevant. (3) The pursuers' averments can only be proved by the defender's writ or oath. (4) Even assuming that a verbal agreement such as that alleged by the pursuers were proved by competent evidence, the defender was entitled to resile from it and bring it to an end. (5) The pursuers' averments being unfounded in fact and in law, the defender is entitled to be absolved, with expenses."

The Sheriff-Substitute (ERSKINE MURRAY) allowed both parties a proof before answer of their averments. Thereafter he found . . . . "(3) That defender John Phillips agreed to come into the transaction in Strachan's shoes, taking his share of the stock, dogs, &c., his right to shoot, and his responsibility, on payment to Strachan of £40, which was paid; (4) that thereafter, during the rest of the seasons 1877-78 and 1878-79, defender continued to shoot with the other three over Cumbernauld, paying his share of the rent and expenses, and receiving his share of the game; and when the landlord proposed a surrender of the lease, defender was the person who proposed that a high bonus should be asked; (5) that at the end of the season 1878-9, he, as well as Livingstone, intimated their intention of not shooting on Cumbernauld next year, and, as in Strachan's case, steps were taken, by advertising and otherwise, to get strangers to fill up the vacancies; (6) that these attempts proving unsuccessful, Stewart, who managed the concern, having applied to defender at the commencement of the shooting season of 1879-80 for his share of the rent and expenses, he wrote back on 20th August saying he was quite willing to pay one-fourth share of the rent for the season, and suggesting that they should find someone to make up the difference, and adding that if Stewart let him know how much it was, he would send a cheque for it; (7) that the cheque, however, never was sent; and after further correspondence, negotiations, and attempts at arbitration, the present action was raised in February 1881 for £75, 13s. 8d., as defender's fourth share of the cost of the shootings