LORD TRAYNER—I agree. The general rule is that legacies bear interest like any other money debt from the date when they are due and payable. We must therefore ascertain when the legacies in question were payable in order to fix the time when interest (if any) began to run.

At first I was under the impression that the third parties were right. The trustees are bound to pay the legacies only when they can realise funds sufficient to pay all the legacies at the same time. Now, the statement in the case is that the trustees had at Whitsunday 1899, for the first time since the death of the truster, sufficient funds to pay all the legacies at the same time. I concluded that this amounted to an admission that the trustees could not have realised sufficient funds before that date. But I now understand that this statement only means that the trustees then first in fact had sufficient funds. It does not mean that they could not have realised sufficient funds sooner. On the contrary, it appears that there was estate which could have been realised at once after the testator's death, and which would if realised have provided funds sufficient to pay all the legacies. The trustees could and therefore should have so realised and paid the legacies. They were then due and payable, and if not then paid must bear interest from that time till paid.

I make no reflection upon the trustees for holding up the estate, and indeed their action has been justified by the result; but it would not be fair that they should be allowed to hold up the estate for the benefit of the residuary legatees at the expense and against the interest of the other legatees.

LORD JUSTICE-CLERK—I am of the same opinion, and have nothing to add except this, that I see in the case of *M'Innes* that there are no opinions given in the report but only the decision of the Court on the questions requiring to be solved. There is nothing to show that the case was not decided upon special circumstances. Indeed it appears from the report that much of the estate was in India, which might well have been the ground of the judgment, because the difference between British and Indian currency might give reason for holding that the executors could not readily realise with advantage to the beneficiaries, and therefore that there might be special reason for not compelling them to pay interest till after a reasonable time had elapsed.

LORD YOUNG and LORD MONCREIFF were absent.

The Court pronounced this interlocutor—

"The Lords having heard counsel for the parties to the special case, Find in answer to the questions therein stated, that the second party is entitled to payment out of the trust-estate of the deceased Mrs Brodie Gordon May of interest, which by consent of parties is to be taken at the rate of Four pounds per centum per annum, on the legacy of £1000 bequeathed to her, from the date of the testator's death: Find and declare accordingly, and decern: Find the whole parties to the special case entitled to their expenses, as the same may be taxed, out of the residue of the said trust-estate."

Counsel for the First and Second Parties — Johnston, Q.C. — C. K. Mackenzie. Agents—Gillespie & Paterson, W.S.

Counsel for the Third Parties—J. J. Cook —J. G. Spens. Agents—W. & J. Cook, W.S.

Thursday, February 22.

SECOND DIVISION.

[Lord Stormonth Darling, Ordinary.

BO'NESS PARISH COUNCIL *v.* BO'NESS KIRK-SESSION.

Local Government — Parish Trust or Ecclesiastical Charity — Local Government (Scotland) Act 1894 (57 *and* 58 *Vict. cap.* 58), *secs.* 30 *and* 54—*Trust—Charitable Trust—Poor.*

In the year 1707 the kirk-session of a parish in order to "improve the poor's money to the best advantage" purchased certain lands with money taken from a box generally called in the minutes the "poor's-box," but sometimes referred to as the "kirk-box." This box contained the general funds of the kirk-session derived mainly from church collections, but also from such sources as proclamation dues, funeral dues, payments for the use of mort-cloths, payments for ringing the church bell, and the like. The funds belonging to the kirk-session were expended mainly for relief of the poor, legal and occasional, but also on a number of church disbursements, such as payments to beadle and to bellringer, and for heating and lighting, and expenses incurred in connection with the use of church. The title to the lands purchased was taken in name of the box-master of the poor's-box and eleemosynar of the kirk-session, for the use and behoof thereof and of the poor of the parish. After the date of the title the lands were referred to as "the lands belonging to the poor" or "the poor's acres," and it was admitted that the kirk-session expended on behalf of the poor of the parish a sum greater than that derived from the lands. In a minute of the kirk-session dated 5th May 1856 they "reiterated their resolution to expend the income from the poor lands for the relief of the poor exactly in the same manner as it had been expended for the last 150 years."

Held (*rev.* judgment of Lord Stormonth Darling) that these lands and the revenues derived therefrom did not form an ecclesiastical charity within the meaning of section 54 of the Local

Government (Scotland) Act 1894, but were held for behoof of the poor of the parish, and that they must therefore, under section 30 of the Act, be transferred to a committee of management consisting of not more than three members of the kirk-session chosen by them and such number of persons appointed by the Parish Council as the Local Government Board should approve.

By section 30 of the Local Government (Scotland) Act 1894 it is enacted as follows:—"(1) When trustees hold any property wholly or mainly for the benefit of the inhabitants of a single parish, or any of them, as such inhabitants, or for any public purpose connected with a single parish other than (*a*) for an ecclesiastical charity, (*b*) for an educational endowment within the meaning of the Educational Endowment (Scotland) Act 1882, or (*c*) for the use or benefit of the poor of the parish within the meaning of section 52 of the Poor Law (Scotland) Act 1845, they may transfer the property to the parish council of the parish, or to persons to be from time to time appointed by that council, and the parish council, if they accept the transfer, or persons whom they appoint, shall hold the property on the trusts and subject to the conditions on which the trustees hold the same. (2) In the event of any such property not being transferred to the parish council under and subject to the provisions of the preceding sub-section, the parish council of the parish concerned may from time to time appoint such number of additional persons to act along with the trustees of the said property, as the trustees and the parish council may agree upon, or in default of such agreement, as may be approved by the board in each case, provided that where the trustees of any such property are elected by or include persons elected by parish electors or inhabitants of the parish, or are members of the county or town council, or are burgh commissioners, the provisions of this sub-section shall not apply unless the board by order so prescribe. (3) Where the trustees of any such property are the kirk-session, or the heritors and kirk-session of any parish, or the kirk-session or deacons' court, or managers or vestry of a congregation belonging to any religious denomination, to the number, whether alone or conjoined with others, of not less than six persons, the said trustees shall from time to time appoint certain of their own number, not exceeding three, and the parish council of the parish shall from time to time appoint such number of additional persons as the board may in each case approve, to act together as a committee of management of the said property, and such management shall be transferred to the committee accordingly."

By section 54 of the said Act it is provided that "the expression 'ecclesiastical charity' includes a charity the endowment whereof is held for some one or more of the following purposes—(*a*) for theological instruction or for the benefit of any theological institution; or (*b*) for the benefit of any ecclesiastical person or officer as such; or (*c*) for use, if a building, as a church, chapel, mission-hall or room, or Sunday school, or otherwise, by any particular church or denomination; or (*d*) for the maintenance, repair, or improvement of any such buildings as aforesaid or for the maintenance of divine service therein; or (*e*) otherwise for the benefit of any particular church or denomination or of any members thereof as such: provided that where any endowment of a charity other than a building held for any of the purposes aforesaid is held in part only for some of the purposes aforesaid, the charity, so far as that endowment is concerned, shall be an ecclesiastical charity within the meaning of this Act."

The Parish Council of Borrowstounness and Carriden raised against the Kirk-Session of Bo'ness an action—(*First*) To have it declared that the defenders held the lands and others after mentioned "as trustees for the benefit of the inhabitants of the said parish of Bo'ness, or for the benefit of the destitute or needy or poor among such inhabitants, or for public purposes connected with said parish, and otherwise than (*a*) for an ecclesiastical charity within the meaning of the said Local Government (Scotland) Act 1894, or (*b*) an educational endowment within the meaning of the Educational Endowments (Scotland) Act 1882, or (*c*) for the exclusive use or benefit of the poor of said parish within the meaning of section 52 of the Poor Law (Scotland) Act 1845—namely, (1) these two and one-half acres Scots of land or thereby in the barony of Kinneil and sheriffdom of Linlithgow, which sometime belonged to Thomas Knox, skipper in Borrowstounness, and Mary Callander or Knox, his spouse, and also these other two and one-half acres Scots of land or thereby, also in said barony and sheriffdom, which sometime belonged to the said Thomas Knox, and thereafter to Elizabeth and Mary Cumming in Borrowstounness, all and more particularly bounded and described in a charter of novodamus granted by the Duke of Hamilton in favour of John Henderson, baker in Borrowstounness, boxmaster of the poor's-box and eleemosynar of the said kirk-session, and his successors in office, dated 6th November 1855, and in an instrument of sasine following thereon, recorded in the Particular Register of Sasines for the sheriffdom of Edinburgh, Linlithgow, &c., on 16th February 1856; (2) a plot of two acres or thereby of land situated in Deanfield, near Bo'ness, purchased by the said Kirk-Session of Bo'ness in or about the year 1702 from John Morton, surgeon in Borrowstounness, out of the funds of the poor's-box, more particularly described in a charter of declaratory adjudication by the said Duke of Hamilton in favour of the said John Henderson, as boxmaster and eleemosynar foresaid, dated 6th September 1853, and instrument of sasine following thereon, recorded in the said Register of Sasines on 10th January 1854; (3) that piece of garden ground at Providence, Bo'ness, commonly known as Scrimgeour's Garden, acquired by the said kirk-session from James Scrimgeour or his creditors in or

about the year 1780, in satisfaction of a loan they had previously made to the said James Scrimgeour out of funds held by them for behoof of the poor of the said parish; (4) the sum of £15 sterling payable yearly to said kirk-session, being a legacy or annuity bequeathed by David Mackie, sometime tenant in Nineware in the parish of Dunbar, for the use of the poor of the parish of Bo'ness and of the poor of the barony of Kinneil, equally between them, in or about the year 1749, payable at Lammas yearly, said legacy being heritably secured over subjects at Dunbar:" (*Second*) to have the defenders ordained to produce a full, true, and particular inventory, statement, and account, with all necessary writs of all lands and property, heritable or moveable, held by them either wholly for the purposes foresaid or partly for said purposes: (*Third*) to have it declared that the said defenders were bound, in terms of section 30 of the said Local Government (Scotland) Act 1894, to appoint certain of their number, not exceeding three, to act together with such number of additional persons as the pursuers may appoint, and as the Local Government Board for Scotland may approve as a committee of management of the whole of the said lands, subjects, and others at present held by the defenders as trustees foresaid: (*Fourth*) to have the defenders ordained to appoint certain of their number, not exceeding three, to act on such committee of management.

The pursuers averred—"At the passing of the Poor Law (Scotland) Act 1845, the Kirk-Session of Bo'ness had certain properties and funds under their charge for the benefit of the poor of the parish and for other public purposes, and *inter alia*—(1) the lands first described in the summons, which were purchased with the funds of the poor's-box by the said kirk-session in or about the years 1707 and 1709 from Thomas Knox, skipper in Borrowstounness, and his wife, and from Elizabeth Cumming and Mary Cumming in Borrowstounness; (2) the plot of land second described in the summons, situated in Deanfield near Bo'ness, purchased by the said Kirk-Session of Bo'ness in or about the year 1702 from John Morton, surgeon in Borrowstounness, out of the funds of the poor's-box; (3) a piece of garden ground called Scrimgeour's Garden, at Providence, Bo'ness, acquired as after mentioned; and (4) an annual payment of £15, being a legacy or bequest by David Mackie, sometime tenant in Nineware, in the parish of Dunbar, for the use of the poor of the parish of Bo'ness, and of the poor of the barony of Kinneil, equally between them, in or about the year 1749, and heritably secured over subjects in Dunbar. The funds of the poor's-box of the said kirk-session out of which the lands (1) and (2) above mentioned were purchased, were held by the kirk-session and their boxmaster or eleemosynar for the benefit of the poor of the parish. . . . The funds and others which are now in question were all acquired and held by the defenders' predecessors, and by the defenders themselves, for the benefit of the poor of the parish, and for no other purpose. If the said funds or any part thereof were expended on ecclesiastical purposes, as the defenders allege, such expenditure was illegal, and the defenders are accountable therefor."

They pleaded, *inter alia*—"(1) The lands, subjects, and others described in the summons having been originally acquired and purchased by the defenders' predecessors out of the funds of the poor's-box or out of funds in their hands for the benefit of the inhabitants of the parish of Bo'ness, or of the destitute or needy or poor among said inhabitants, or for the public purposes of said parish, the pursuers are entitled to decree in terms of the conclusions of the summons. (3) On a sound construction of the Local Government (Scotland) Act 1894, and particularly of section 30 thereof, the said lands, subjects, and others fall to be managed by a committee appointed in the manner set forth in the summons, and the pursuers are entitled to decree in terms of the conclusions thereof."

The defenders "admitted that at the passing of the Poor Law Act 1845 the Kirk-Session of Bo'ness held the properties first and second here mentioned. It is explained that the Kirk-Session of Bo'ness had certain funds which were derived from various sources. These sources included the sources from which the funds of a kirk-session were usually derived. The whole moneys of the kirk-session, including moneys applicable and applied for relief of the poor, were kept together, and were known as session funds, church funds, the 'kirk-box,' 'box,' or frequently 'poor's-box,' from the fact that out of the united fund the kirk-session attended to the claims of the poor. The person in charge of this fund for the kirk-session was appointed by them, and was called the kirk treasurer, boxmaster, or eleemosynar. The said lands first and second mentioned were about the beginning of the eighteenth century purchased out of the united fund, and the title was taken to the boxmaster or treasurer 'for behoof of the kirk-session and of the poor of the parish,' and the subjects are still held for behoof of these two joint beneficiaries. . . . It is explained that the funds referred to, and all funds coming into the hands of the kirk-session, were held as one fund. The funds of the kirk-session from all sources have . . . been expended upon the proper objects of both the beneficiaries for whom the lands and others referred to in this action are held. . . . Thus on the one hand a considerable sum derived from a sale of ironstone was expended in 1856 in assisting in the erection of a poorhouse for the legal poor, and donations have also been given for the benefit of that class of poor, while the occasional poor have also been supported and aided. On the other hand a sum was expended in aiding or assisting in aiding in the erection of a new session-house which was necessary for the parish, and in managing, maintaining, and improving the fabric of the church and its appurtenances, and in payment towards bursaries to students, salaries of church-officers, precentors, and the neces-

sary ecclesiastical expenses of the church and parish, while aid has been given to deserving persons specially connected with the parish church congregation, or who had special needs and claims on the kirk-session. The said fund constituted an ecclesiastical charity in the sense of the Local Government (Scotland) Act 1894, and has been carefully expended as such by the kirk-session, to the great advantage of the parish and of the congregation worshipping in the parish church thereof."

They pleaded, *inter alia*—"(3) The action cannot be maintained, in respect that section 30 of the Local Government Act 1894 does not apply to the lands and funds in question. (5) The defenders should be assoilzied, in respect that the lands and funds referred to in the summons (or at least the lands (1) and (2) specified therein) were acquired and have been lawfully held and administered in part for behoof of the kirk-session for the ecclesiastical purposes referred to in section 54 of the said Local Government Act 1894."

A proof was led before the Lord Ordinary (STORMONTH DARLING). The facts shown by the proof and productions are fully set forth in the opinions of the Lord Ordinary and Lord Trayner.

On 20th July 1899 the Lord Ordinary pronounced the following interlocutor: "Finds, decerns, and declares in terms of the first conclusion of the summons, so far as regards the subjects mentioned in the third and fourth heads thereof: Assoilzies the defenders from the said conclusion so far as regards the other subjects mentioned therein, and also from the second conclusion; *quoad ultra* continues the cause," &c.

Note.—"This action relates to four heritable subjects belonging to the Kirk-Session of Bo'ness, and the question is whether these or any of them form 'parish trusts' within the meaning of section 30 of the Local Government Act of 1894, with the result that the management of them is to be handed over to a joint committee appointed by the kirk-session and the Parish Council.

"The definition of parish trusts in section 30 is property held by trustees 'wholly or mainly for the benefit of the inhabitants of a single parish, or any of them, as such inhabitants, or for any public purpose connected with a single parish;' but from this wide description three classes of trusts are excepted. With two of these we are not here concerned, for nobody says that these properties constitute an 'educational endowment,' nor can they be said to be held for the use or benefit of the legal poor of the parish within the meaning of section 52 of the Poor Law Act of 1845, because if they were they ought to be handed over to the Parish Council itself, and not to a joint committee. But in truth this question is foreclosed by the fact that these properties which in 1846 had been transferred to the parochial board of the parish under the impression that they fell under section 52 of the Poor Law Act, were in 1853 re-transferred to the kirk-session, all parties being satisfied by the judgment in the *Linlithgow* case, 18 D. 37, that the transfer of 1846 had proceeded on a mistaken view of the law.

"There remains for consideration the third exception from the definition of parish trusts in section 30, viz., the case of an 'ecclesiastical charity.' Now, that expression is defined by section 54 as including a charity the endowment whereof is held for (taking it shortly) the maintenance, repair or improvement of an ecclesiastical building, or for the maintenance of divine service therein, or otherwise for the benefit of any particular church or denomination, or of any members thereof as such; and then follows this important proviso, that 'where any endowment of a charity other than a building held for any of the purposes aforesaid is held in part only for some of the purposes aforesaid, the charity, so far as that endowment is concerned, shall be an ecclesiastical charity within the meaning of the Act.' Accordingly if these properties, or any of them, are held, even to the smallest extent, for what may be shortly termed ecclesiastical purposes, they do not fall under the category of a 'parish trust' as defined in section 30.

"The properties in question, which together are said to be worth £1700, fall naturally into two divisions—Nos. 1 and 2 having been bought early in the eighteenth century out of the savings of the whole funds administered by the kirk-session; while Nos. 3 and 4 represent the investments of two bequests made later in the same century to the kirk-session. It seems to me that Nos. 3 and 4 do fall under the definitions of 'parish trusts,' and that Nos. 1 and 2 do not.

"Dealing first with Nos. 3 and 4, I find it admitted by joint-minute for the parties that in 1768 the kirk-session received a bequest from George Gillespie, shipmaster in Amsterdam; that in the absence of his will the only information in possession of the parties is derived from the minute-books of the kirk-session, in which the money is mentioned as 'bequeathed to the poor of the parish of Bo'ness,' and that 'Scrimgeour's Garden' came to be the investment of that bequest. Next I find from the same joint-minute that in 1749 'David Mackie disponed an annuity 'of £15 to the kirk-session for the use of the poor of the parish of Bo'ness and of the poor of barony of Kinneil equally betwixt them, the annuity being heritably secured over subjects at Dunbar. Now, these must be taken to be bequests not for the legal poor only, but for the poor both legal and occasional. But that seems to me precisely to answer the description in section 30—in other words, the property is held for the benefit of the inhabitants of a single parish as such. The introduction as regards Mackie's annuity of the barony of Kinneil creates no difficulty, because the barony of Kinneil and the parish of Bo'ness are in point of fact co-extensive. There is no hint or suggestion by either testator of the money having been intended for an ecclesiastical purpose, and therefore it seems to me that as regards these properties the kirk-session have no good answer to the demand of the Parish Council.

"It is otherwise, I think, with properties Nos. 1 and 2, which represent investments made by the kirk-session out of its general funds. Here undoubtedly a question of general importance is raised, because I apprehend that the administration of the Kirk-Session of Bo'ness has not differed from that of most other parishes in Scotland. It must always be remembered that these bodies were originally and essentially ecclesiastical in their character, and that their functions as guardians of the poor were superadded to their original functions, first by use and wont, and then by statute. Their funds were derived mainly from voluntary collections, but also from such sources as proclamation dues, funeral dues, payments for the use of mortcloths, payments for ringing the church bell, payments for allowing marriages to be celebrated in houses, and the like. Again, their funds were expended mainly, no doubt, for the relief of the poor, legal and occasional, but they also undertook, and so far as I can see quite legally undertook, a number of payments both regular and occasional in connection with the 'maintenance of divine service.' They paid the salaries of the session-clerk, the beadle, and the bell-ringer; they heated and lighted, and repaired the interior of the church, and they sometimes prepared for the out-door celebration of the Sacrament by the erection of a tent. The case of *Cambuslang*, M. 10,570, directly recognises the legality of a 'new tent for field preaching,' and if that was a payment within the competence of a kirk-session, I cannot imagine on what principle the legality of more normal outlays, which did not form a burden on the heritors, could possibly be disputed. It is quite true that from an early period the heritors had a right to call the kirk-session to account for their administration of ordinary collections in order that the burden of supplementing these might not be unduly increased. It is also true that with the same view kirk-sessions were directed by the Proclamation of 1693 to pay over one-half of the collections to the heritors. That principle sufficiently explains the cases of *Speirs*, 9 S. 659, and *Panmure*, 1 D. 840, on which the pursuers founded. But there is no decision so far as I am aware which throws any doubt upon the right of kirk-sessions to make customary disbursements for church purposes out of the general funds under their charge. Unquestionably the Kirk-Session of Bo'ness made such disbursements to a very considerable extent, and if they did so legally even to a small extent, then the properties bought with their savings were held 'in part for ecclesiastical purposes, which is enough to save them from the operation of section 30.

"An attempt was made by the pursuers to show that the money with which these properties were bought was earmarked by the kirk-session as intended for the poor alone. The titles give no encouragement to that view, because they describe the lands as held 'for the use and behoof of the kirk-session and of the poor of the parish of Bo'ness,' which is inconsistent with the idea that the poor were the sole beneficiaries. But the pursuers point to minutes such as that of 6th March 1707, which speaks of money 'lying in the eleemosynar's hand,' and states the willingness of the kirk-session 'to improve the poor's money to the best advantage.' But it seems to me that no weight can be attached to casual expressions of that kind, which are obviously used without precision. The same functionary is sometimes called 'eleemosynar' and sometimes 'treasurer.' The same box is sometimes called the 'poor's-box' and sometimes 'the kirk-box.' References to the poor in connection with either money or land are sufficiently accounted for by the fact that the poor were the principal beneficiaries of the whole property in the hands of the kirk-session. But such expressions by no means imply that savings made out of the general funds were intended to be set apart and to be expended differently from the general funds themselves.

"I shall therefore give decree in terms of the first conclusion of the summons as regards the properties Nos. 3 and 4. I shall assoilzie the defenders from the said conclusion as regards the other subjects, and also from the second conclusion, and *quoad ultra* I shall continue the cause."

The pursuers reclaimed, and argued—They were entitled to decree in terms of the first conclusion as regards the subjects first and second specified in the summons as well as regards the third and fourth. These properties were purchased by money taken from the poor's-box. There was no doubt that almost the whole of the money that was placed in that box consisted of church-door collections. These collections belonged exclusively to the poor, and must be applied in their behalf—*The Heritors* v. *The Minister of Humbie*, Feb. 15, 1751, M. 10,555; *Hamilton* v. *Minister of Cambuslang*, Nov. 23, 1752, M. 10,570; *Heritors of Neilston* v. *Fleming*, June 1, 1831, 9 S. 659; *Lord Panmure* v. *Sharpe*, May 30, 1839, 1 D. 840. Some small amounts might be received from other sources, but these were exceptional, and some of these exceptional sources, such as dues received from the use of hearses and mortcloths, belonged to the poor—Dunlop's Parochial Law (3rd ed.) 401. The conveyances of the lands had been taken in the name of the treasurer of the kirk-session for the use and behoof of the kirk-session and the poor of the parish, but this was done because a feudal conveyance required to be taken in the name of an individual, and in order that the kirk-session might call him to account he was described as holding on behalf of the kirk-session. But the purpose for which he held was for the use and behoof of the poor of the parish of Bo'ness. The kirk-session records also showed that these lands were designated "poor's acres" and "lands belonging to the poor," and that the income derived from them was expended for behoof of the poor.

Argued for defenders—The money in the poor's-box was not exclusively derived from church collections. That box was called

"poor's-box" or "kirk-box," and was the common box containing all the funds belonging to the kirk-session derived from the sources enumerated by the Lord Ordinary. These sources included money received for ringing bells which did not belong to the poor—*Minister of Montrose* v. *Magistrates*, July 2, 1733, M. 7915. With these general funds the properties in question had been purchased. The title showed that the lands were taken in name of one trustee, the treasurer of the kirk-session on behalf of two beneficiaries, the kirk-session and the poor of the parish. The money was to be applied not only for the use and behoof of the poor of the parish, but also for the use of the kirk-session, viz., any use approved of by them. The kirk-session had always had other functions besides the administration of the poor, although, no doubt, this latter constituted an important part of their duties. The *Cambuslang* case, *supra*, clearly showed that even what was accounted poor's money could be applied for purposes other than relief of the poor. The Lord Ordinary's judgment was right.

At advising—

LORD TRAYNER—The pursuers in this action ask to have it declared that the defenders hold certain properties specified in the conclusions of the summons for behoof of the poor in the parish of Bo'ness, and also to have the defenders ordained to nominate three of their number to act along with the pursuers in the future administration of these properties and their revenues. In suing this action for decree as aforesaid, the pursuers are proceeding under the provisions of the Local Government Act of 1894, and are entitled to decree if they can show that the properties in question are held by the defenders for the benefit of the poor in the parish of Bo'ness, and not (1) for an ecclesiastical charity, (2) an educational endowment, or (3) for the legal poor within the meaning of the Poor Law Act of 1845. The defenders do not maintain that the properties in question are held by them either for the legal poor or for any educational purpose, but they resist the pursuers' demand on the ground that the properties in question and their revenues are held by them partly for the benefit of the poor and partly for ecclesiastical purposes, and that therefore they fall under the class of ecclesiastical charities, in reference to which they are not, under the Local Government Act, bound to share the administration with the pursuers.

The Lord Ordinary has decided against the defenders in so far as concerns the subjects third and fourth specified in the summons, but has assoilzied the defenders in so far as regards the subjects there specified in the first and second places. The pursuers have reclaimed against this decision, but the defenders have not. The question, therefore, which we are called on now to determine is, whether the Lord Ordinary is right in holding that the properties first and second specified in the summons are held by the defenders, in whole or in part, for ecclesiastical purposes? After careful consideration of the cause and of the argument addressed to us (which was both able and interesting) I have come to be of opinion that the Lord Ordinary's judgment should be recalled. I think it is established that the properties in question and their revenues are held by the defenders for the benefit of the poor in the parish and for no other purpose.

I agree with the view put forward by the defenders, that in determining for whom or for what the defenders hold and administer the properties in question it is important to consider (1) from what source the money came with which these properties were purchased; (2) the history of the administration and application of the revenue derived from them; and (3) the terms of the title under which the lands are held. To each of these matters I shall briefly advert, but it may be convenient to take the first and second of these heads together.

The lands (known as Morton's and Knox's lands) were purchased in the first decade of last century, and were paid for undoubtedly with money taken from the poor's-box of the parish church, which is referred to also sometimes but not often as the "kirk-box" in the records of the kirk-session. With regard to the purchase of Morton's lands we have no entries in the kirk-session's minutes, but the purchase of the first part of Knox's lands was resolved upon by the kirk-session in order to "improve the poor's money to the best advantage" (minute of 6th March 1707), and from that date onwards the lands in question are referred to as "lands belonging to the poor," "belonging to the church poor," the "poor's acres," "the acres belonging to the poor," and the rent of these lands is the "poor's land rent" and "rent of the poor's lands." There is no reason to doubt that the revenue of these lands was entirely expended in the relief of poor and needy persons, and not expended upon any other object. Indeed, it was stated at the Bar by the pursuers, and not controverted by the defenders, that not only the whole income derived from the lands mentioned in the summons, but more, had been disbursed by the defenders and their predecessors on relief of the poor. This of itself goes far to show that the lands now in question were held and their revenue administered for behoof of the poor, and for no other purpose. And so late as 5th May 1856 the defenders in their minute of that date "reiterated their resolution to expend the income from the poor lands for the relief of the poor exactly in the same manner as it had been expended for the last 150 years." Now, it is not disputed that the "poor's lands" here referred to include Knox's and Morton's lands, and therefore we have the defenders expressing their resolution to expend the revenue derived from them on the relief of the poor, as the Session had already done for a century and a-half. But while the defenders do not deny that the whole revenue derived from Knox's and Morton's lands have been expended for relief of the poor from the

time of their purchase until now, they do not admit that the lands were purchased with what was exclusively poor's money, or that they were bound to expend the whole of these revenues on relief or for behoof of the poor. The defenders maintain that although the price paid for the lands in question was taken from the "poor's-box" or the "kirk-box," yet that that box contained money derived from other sources (such as bell-ringing, mortcloth dues, &c.) than the church-door collection, which belonged to the poor, and accordingly the defenders argue that the lands having been bought out of funds held generally for the relief of the poor and for ecclesiastical purposes, they are entitled to hold the lands so bought and paid for for the same purpose for which they held the money before it passed away as the price of the lands. It is conceded by the pursuers that if the lands in question were or are held by the defenders in part for ecclesiastical purposes, then the pursuers cannot succeed in their present demand. Now, I think it may be admitted, not because it is proved, but because it is so probable, that there were moneys put into the poor's or kirk box which were not derived from the church-door collections, and were therefore not devoted to the poor, and that out of these moneys disbursements were made by the kirk-session for purposes which may be regarded as ecclesiastical. But that admission made, it does not appear to me to have any material effect on the question before us. The money derived from the church-door collections was (it is more than probable) considerably in excess of money derived from the other sources I have alluded to. But however that may be, the money taken from the poor's-box for the purchase of the lands in question, whether wholly or chiefly derived from the church-door collections, was dedicated by the defenders nearly two centuries ago to the poor. The lands then purchased were taken as for the benefit of the poor, and designated then and ever since by the defenders and their predecessors as "poor's lands." The whole income of these lands has been expended for behoof of the poor, and in these circumstances I think it impossible to resist the conclusion that the defenders have held said lands as for the poor in the parish, and for no other trust or purpose, as indeed they declared they did in 1856. That the kirk-session took from time to time small sums from the poor's-box or kirk-box to meet charges connected with the church, may have been right enough, if they had money in that box which they could lawfully apply to such charges. They certainly could not take any money out of the church-door collections for any such purpose. But the facts to which I have already adverted, namely, that the price of the lands was taken from the poor's-box, being either the money devoted to the poor by the donors at the church door or by the kirk session or others, that the lands have all along been designated the poor's lands, and that their revenues have been entirely devoted to the relief of the poor, appear to me to lead necessarily to the conclusion for which the pursuers contend.

It only remains that I should consider the terms of the titles under which the lands in question are held. We have not the original conveyance of Morton's lands, but the description of it given in the summons of declaratory adjudication raised in 1853 may be taken as correct or approximately so. That summons sets forth that the conveyance of Morton's lands was granted in favour of James Anderson, then boxmaster of the poor's-box and eleemosynar of the Kirk-Session of Bo'ness "for the use and behoof thereof, and of the poor of the parish." The sasine on the original conveyance of part of Knox's land is produced, and shows that it proceeded on a conveyance by Knox in favour of "the said James Anderson, boxmaster and elymosiner foresaid," and his successors in office, boxmaster of the poor's-box and eleemosynar of the Kirk-Session of Bo'ness, "for the use and to the behoove thereof, and of the poor of the said parosh." The titles thus bear to have been taken in name of the "boxmaster of the poor's-box and eleemosynar" of the kirk-session, for behoof of the kirk-session and the poor. The defenders therefore maintain that the titles show that the lands were not held exclusively for the poor, but also for the kirk-session. The first thing to be noticed in regard to this is the fact that Morton's lands and Knox's lands were both paid for with money taken from the poor's-box. That is distinctly set forth in the narrative of Morton's conveyance (as given in the summons of adjudication), and Knox's lands were bought (as the minutes of the kirk-session of 6th March 1707 bear) as a means of improving "the poor's money to the best advantage." If, then, the lands were bought with "poor's money," the kirk-session could have no interest in them beyond their administration on behalf of the poor, nor could they administer lands so bought for or to the behoof of any other. But the reason why the conveyances were taken in the terms in which they were taken is easily explained. No feudal conveyance could be taken in favour of the poor or of the kirk-session. The conveyances had to be taken in name of an individual or individuals named, who could be entered as the vassal or vassals of the superior. The conveyance was therefore properly taken in name of the boxmaster, who held the poor's money (whatever else he held), to comply with this requirement of feudal conveyancing, and because he was the holder and disburser of the poor's money he was the proper disponee "for behoof of the poor." He was, however, also the officer of the kirk-session, and in order to give them a right to call him to account for his intromissions with the rents of the lands, he was declared to hold for behoof of the kirk-session. In short, the conveyance to Anderson for behoof of the kirk-session and the poor of the parish shows, as I think it was intended to show, that while Anderson held under the orders of the kirk-session, he and they

did so primarily, and indeed only for the benefit of the poor. The fact to which I have alluded more than once that the lands were paid for out of the poor's money, excludes the idea that the lands were or could be held beneficially for any other interest than that of the poor.

Giving due consideration therefore to the three matters on which the defenders rely—the source from which the money came with which the lands were bought, the history of the administration and application of the revenues of the lands, and the state of the titles under which the lands were and are held, I have come to the conclusion that the defenders' contention cannot be successfully maintained.

The Lord Ordinary has assoilzied the defenders from the second conclusion. But I think that is a mistake. The defenders may have to furnish such an inventory as is there called for, and to assoilzie them now would be to determine that they never could be called on for it. But as the pursuers do not now insist in that conclusion, the action *quoad* it should be dismissed. I understood the defenders to say that they they would not resist decree in terms of the remaining conclusions if the Court were against them on the question decided in their favour by the Lord Ordinary. If I am right in this, then decree can be pronounced exhausting the cause, but otherwise, the case should go back to the Lord Ordinary to deal with the remaining conclusions.

LORD JUSTICE-CLERK — LORD YOUNG desires me to say that he concurs in Lord Trayner's opinion, and I do so also.

LORD MONCREIFF was absent.

LORD ADAM, who sat in the Division in order to make a quorum, gave no opinion, not having been present at the hearing.

At the direction of the Court the pursuers amended the first conclusion of the summons so as to make it declare that the defenders held the lands, &c., "as trustees for the benefit of the poor in the parish of Bo'ness, and otherwise than (*a*)," &c.

The Court pronounced this interlocutor—

"Recal the said interlocutor reclaimed against: Find, decern, and declare in terms of the first conclusion of the summons as amended; and in respect the pursuers do not now insist on it, dismiss the action *quoad* the second conclusion of the summons: Find, declare, and decern in terms of the third conclusion of the summons, and decern the defenders within two months from this date, and thereafter from time to time as shall be necessary, to appoint certain of their members, not exceeding three, to act together with such number of additional persons as may be appointed by the pursuers and approved of by the Local Government Board, as a committee of management of the whole lands, subjects, and others mentioned in the summons."

Counsel for Pursuers — W. Campbell, Q.C.—Clyde. Agents—Tods, Murray, & Jamieson, W.S.

Counsel for Defenders—Mackay, Q.C.—C. N. Johnstone. Agents—Menzies, Black, & Menzies, W.S.

Friday, February 23.

SECOND DIVISION.

[Sheriff Court at Stonehaven.

GRAHAME'S CURATOR BONIS *v.* ST CYRUS DISTRICT COMMITTEE OF COUNTY COUNCIL OF KINCARDINE.

Road—Repair—Power of Road Authority to Take Stones from Bank of River — Roads and Bridges (Scotland) Act 1878 (41 *and* 42 *Vict. cap.* 51), *sec.* 123—*Act* 1 *and* 2 *Will. IV., cap.* 43, *sec.* 80—"*Land*"—"*Enclosed Land.*"

A bank of shingle lying upon the bank of a river, but above the level of its bed, was bounded by the river and by a strip of pasture land, which in turn was bounded by a fence extending at both ends to the river bank, and meeting it at points respectively some distance above and some distance below the shingle bank. *Held* that even if the shingle bank was "land" within the meaning of the Turnpike Act, 1 and 2 Will. IV. cap. 43, section 80 (as it was assumed to be for the purposes of this decision), it was "enclosed land" within the meaning of that section, and that consequently the road authority was only entitled to take stones from it for mending the roads if they were not required for the private use of the owner or occupier.

Opinions per curiam that the case of *Lyell's Trustees* v. *Forfarshire Road Trustees*, May 18, 1882, 9 R. 792, deserves reconsideration.

This was an action brought in the Sheriff Court at Stonehaven by James Barclay Grahame, *curator bonis* to Francis Barclay Grahame, Esquire of Morphie, heir of entail in possession of the lands of Morphie and others, and the trustees of the deceased Barron Grahame, Esquire of Morphie, against the St Cyrus District Committee of the County Council of the County of Kincardine, and two carters in their employment.

The pursuers prayed the Court, *inter alia*, "to interdict the defenders and each of them and all others acting for them or under their instructions, from lifting, removing, and taking or carting away boulders, stones, gravel, or other material from the beds, channels, and banks of the river North Esk *ex adverso* of the lands of Morphie and Stone of Morphie, belonging to the said Francis Barclay Grahame, and