

dent in St Andrews "at the lowest price at which they have ever sold mussels." It was not denied at the debate, that the price stated truly was the lowest price at which sales had been made as alleged by the complainers. And this being the case, I am of opinion that this matter has been rightly disposed of by the interlocutor granting the interim interdict.

On these grounds, I am of opinion that the reclaiming note should be refused.

**LORD BENHOLME** concurred. The complainers' title was impeached. There is no doubt the Crown can grant a right of property in the scalps. This has been recognised in cases, and in the Act of 10 and 11 Vict., making the taking of oysters from private scalps a theft. Whether the general title will carry scalps is *sub judice*.

**LORD NEAVES** concurred, but desired to reserve his opinion even as to the possibility of appropriating scalps, and said that the preamble of an Act could never alter the law.

The Lord Ordinary's interlocutor was accordingly adhered to.

Agents for Complainers—Dundas & Wilson, C.S.  
Agent for Respondents—Andrew Beveridge, S.S.C.

Thursday, June 14.

INSPECTOR OF POOR OF KINGLASSIE PARISH  
v. KIRK-SESSION OF KINGLASSIE.

*Poor—Disposition—Kirk-Session—Parochial Board—Poor Law Amendment Act, § 52.* Held that a disposition of lands in 1726, in favour of the minister of the parish and three elders of the session "and their successors in office from time to time as minister and elders of the said kirk-session for the use and behoof of the poor of said parish," fell under the provision in the 52d section of the Poor Law.

The question in this case is whether a certain farm, purchased in 1726, belongs to the heritors and kirk-session, on behalf of the legal poor of the parish of Kinglassie, or is vested in the kirk-session exclusively, and for the purpose of distribution, according to their discretion, amongst the poor persons in the parish, whether possessing a legal right of relief or not.

The funds with which this purchase was made appear to have been certain accumulations from donations, collections, fines, and other sources, which are described in the minutes of the kirk-session as being in "the poor's-box" of the parish. The active administration of these funds had been taken by the kirk-session of the parish. But the minutes show that, posterior to the Proclamation of 11th August 1692, by which the heritors and kirk-session had the duty of providing for the relief of the poor laid on them jointly, the heritors of Kinglassie had more or less intervened in the administration of the poor funds. In 1726 it appears that part of these funds were applied to the purchase of the farm of Ramore by the minister and a committee of elders, with the approval of the kirk-session and heritors.

The disposition itself has not been recovered, but its terms are shown by those of the instrument of sasine which passed on it, and of a charter of confirmation afterwards granted by the superior. The disposition was in favour of the then minister, and certain elders specially named—"elders and mem-

bers of the kirk-session of Kinglassie, and their successors in office, from time to time, as ministers and elders of the said kirk-session, for the use and behoof of the poor of the said parish."

It was maintained, on behalf of the defenders, that the terms of the disposition import a conveyance to the kirk-session as a separate administrative body, altogether apart from the heritors of the parish, and for the purpose of a discretionary distribution amongst poor persons in the parish, whether legally entitled to relief or not. They maintained that the disposition bore this import so clearly that it was not open to be interpreted, far less controlled, by intrinsic evidence. The pursuers, on the other hand, contended, and the Lord Ordinary (**KINLOCH**) held, that the history of the fund must be looked at, and that it was clear from the evidence that the property was not intended to be dealt with in a different way from the poor funds of the parish generally. His Lordship found that at and prior to the passing of the statute 8 and 9 Vict., cap. 83, the property libelled belonged to the heritors and kirk-session of Kinglassie, for behoof of the poor of the said parish.

The defenders reclaims.

**MACDONALD** (with him **GIFFORD**) was heard for them.

**W. M. THOMSON** (with him **YOUNG**) was heard in answer.

In consequence of the difficulty of the question, the Court ordered written argument to be laid before the whole Court. All the consulted judges accordingly returned opinions, with the exception of the Lord President. The following is the opinion of **LORD CURRIEHILL**:—

"In the year 1726 a piece of land called Ramore was purchased by the kirk-session of the parish of Kinglassie, and the disposition thereto was taken in the name of four individuals, viz., the then minister of the parish and three elders of that session 'and their successors in office, from time to time, as minister and elders of the said kirk-session, for the use and behoof of the poor of said parish.' By the statute 8 and 9 Vict., c. 83, § 52, which was passed on 4th August 1845, it is enacted that when any property 'shall, at the time of the passing of this Act, belong to or be vested in the heritors and kirk-session of any parish, or the magistrates or magistrates and town council of any burgh, or commissioners, or trustees, or other persons on behalf of the said heritors and kirk-session, or magistrates, or magistrates and town council, under any Act of Parliament, or under any law or usage, or in virtue of any gift, grant, bequest, or otherwise, for the use or benefit of the poor of such parish or burgh,' such property shall be held to belong to the parochial board established by that statute, and shall be thenceforth administered by that board as therein set forth. The pursuers, the parochial board of the parish of Kinglassie, as established under that statute, claim that that farm of Ramore shall be declared to belong to them, and shall be conveyed to them, or be administered for their behoof, in terms of that enactment.

"In order to dispose of this demand, it appears to be necessary to ascertain whether or not the words, *the poor of the parish*, as used in the disposition of 1726, have the same meaning as that in which they are used in the statute 1845? If they have, the action is clearly well-founded. But if they have not—if the class of persons so designated in the *disposition*, according to the true meaning of the phrase as there used, are a different class of

persons from those who are designated by the same phrase as it is used in the *statute*, the action could not be sustained; because the intention of the Legislature was, not to deprive any class of persons of property which previously belonged to them, or was held in trust for their behoof, whether they had been described by the denomination of the poor of a parish in the title to their property, or by any other denomination—but merely to transfer to the parochial boards thereby constituted the administration of such property as had been previously held for behoof of the class of persons who had had a *legal right* to parochial support.

“The phrase, *the poor of a parish*, is ambiguous. It sometimes means that class of persons who, besides being in destitution, are also disabled by non-age, or by old age, or by bodily or mental infirmity, from earning means for their subsistence. That is the class of persons to which the description is applied in the 52d section of the statute 1845. But the phrase has also been sometimes used as meaning classes of persons who, while not under bodily or mental disability to earn their subsistence, yet, from inability to obtain employment in consequence of stagnation in trade, or from some other adverse circumstances in their lot, cannot procure the means of subsistence, and are thus brought into a temporary state of destitution. Many charitable gifts and bequests have been made for relieving or mitigating the destitution of such persons; and very naturally the benefactors have often committed the management of such funds to the kirk-sessions of parishes, as having the best opportunities of knowing the persons intended to be benefited. The funds arising from the offerings collected at the doors of the parish churches are also administered by the kirk-session alone, chiefly for relief of that class of the poor. By the proclamation of 29th August 1693 one-half of these collections—and by the statute 1845 the whole of them—are administered by the kirk-session alone. Other funds also are left to the exclusive administration of the kirk-session alone for similar purposes. And the kirk-sessions in rural parishes have for time immemorial been in use to apply such funds in relieving the classes of poor who have not applied for relief as a matter of right to the parochial board. And this system has I believe, been attended with the most beneficial consequences, by relieving persons in very distressing circumstances, without their sinking into a state of physical disability and permanent pauperism. But that class of persons are not included among those who are denominated *the poor of the parish* in the 52d section of the statute 1845. On the one hand, the parochial boards established by that Act not only are not bound to apply the funds which are thereby placed under their administration in relieving the necessities of that class of persons, but are not even *entitled* to do so, as a matter of sound discretion and good policy, however clamant may be the destitution and distress of these persons themselves, and of helpless families dependent upon them. On the other hand, funds which may have been provided from private sources, or from church-door collections and other sources of revenue of kirk-sessions before mentioned, are not included among those which, by the 52d section of the Statute 1845, are transferred to the parochial boards thereby established.

“There may, in some cases, be difficulty in ascertaining which of these two different classes of poor were truly meant by grants made for the poor in indefinite terms. But when that matter is ascer-

tained, the provisions receive effect according to the true intent and meaning of the parties by whom they have been made. I make this remark, because in the pleadings I observe some statements which might be read as importing that the Legislature, by the Statute of 1845, had actually deprived all that interesting class of the poor of such provisions as private beneficence had made towards their relief. Probably these statements have not been intended to bear such meaning; but if they have, they are, in my opinion, utterly unwarranted. The Act of 1845 leaves all such provisions in full effect, when the object of them, according to their true meaning and construction, are not the *legal* poor. Since the date when that Act was passed two such deeds have been made the subject of discussion and judgment in this Court,—the one in the case of *Bathgate*, the other in the case of *Lindlithgow*, referred to in the Lord Ordinary’s interlocutor. In both of them the judgment proceeded upon an inquiry into the true meaning and construction of the deeds under which the subjects were held, and it was found that, according to the true meaning of the deed in both of these cases, the grants had been made in favour of the class of poor I am now adverting to. In my opinion, both cases were rightly decided, although in both cases the judgment proceeded upon the meaning of the particular deeds under which the subjects were held, and consequently neither of them afford a precedent for any other case, except to this effect, that the decision of each case will depend upon the meaning of the parties to the deed under which the property is held.

“This being the case, the question we are now dealing with is, What is the true meaning and construction of the disposition of the lands of Ramore, which in 1726 were granted to the minister and three elders of the parish of Kinglassie, and their successors in office, for the use and behoof of the poor of that parish? In dealing with this question the parties have endeavoured to show that that deed should be construed as contended for by them respectively,—*first*, from the terms in which that disposition is expressed; *secondly*, from the source from which the price of the farm of Ramore was paid; and, *thirdly*, from the subsequent usage of the kirk-session and of the heritors, collectively and separately, in the administration of the property, and in the application of its revenues. I think that in doing so the parties have resorted to the legitimate and proper means of construing the deed, and of arriving at the true meaning of the document; and I have followed the same course in endeavouring to form my opinion on the subject.

“In the first place, as to the terms of the deed itself, these appear to me to be ambiguous; and if there were no other elements for ascertaining its meaning, I would have much difficulty in determining which of the two classes of poor it was for which the disposition was obtained. Although the four members of session, to whom and to whose successors in office it was granted, were not the whole of the members of the parochial board, they were among its members; they might have held the property in trust for either class of the poor. I therefore think the language merely of the deed does not, *per se*, afford a safe ground for deciding the question.

“The same remark applies to the inquiries, which both parties have entered into, as to the source from which the price was derived which was paid

by the kirk-session for this land; for it appears from the records and proceedings of the session that the funds under its management, although derived from numerous different sources, were merged together and formed an indiscriminate mass; and that the sum, which was taken out of the mass for paying the price of Ramore, has not been distinctly identified with any of these different sources of income. I do not find, therefore, that the information given us as to the sources of the kirk-session's income affords efficient aid in ascertaining how the sum which was paid as the price of the land was obtained. On this part of the case the pursuers found upon the fact that large portions of these funds were derived from gifts and bequests made by individuals for the poor generally; and they plead that it must be presumed that all such indiscriminate gifts and bequests must be presumed to have been given for supporting the legal poor. I do not think that there is sufficient ground for such a presumption. It would in each case separately depend upon the intention of the donor or testator, as that should be ascertained from its terms as fairly construed, which of the two classes of poor were the objects of his bounty. And in the absence of any information as to the actual intention of ambiguous provisions, I do not see how it can reasonably be presumed that the legal poor were the class meant to be provided for. I think, when the question becomes one merely of presumption, the contrary presumption would be the more probable one; because a gift or legacy to the legal poor would not truly be an act of charity, and would be little or no benefit to that class. In practical effect it would be a gift or bequest in favour of the class who are generally the wealthiest in the parish—namely, the owners, or the owners and occupants, of all the land in the parish. As they are bound by law to provide sufficient funds for the support of the legal poor, a gift or bequest to that class of poor would practically be of no benefit to them, but would operate in relieving the ratepayers of their legal obligation. *In dubio*, therefore, the presumption would be more probable that the class of the poor, whom such donors or testators intend to benefit, are the destitute, who have no legal right to be believed by the owners and occupants of the land in the parish. But I make this remark only as showing that the source, from which the price of Ramore was paid in 1726, has not been so satisfactorily ascertained to have been derived from the funds provided for the legal poor as to afford material aid in construing that deed.

“But the reremains to be noticed the evidence arising from the position which was held by the heritors as well as the kirk-session, which formed the parochial board for the time, in making the purchase, and in the future administration of the property, and of its revenue. In my opinion, this department of the evidence is conclusive in favour of the pursuers. In this respect the present case forms throughout a contrast to the case of *Lmlithgow*. In the first place, throughout the treaty for the purchase of the property the kirk-session consulted the heritors, and acted by their advice at every step; secondly, the revenues of the property have always been dealt with as belonging to the parochial board as part of its funds; and above all, thirdly, the parochial board for the time, including the heritors as well as the kirk-session, have been parties to the leases granted to the tenants of the property. In other words, the paro-

chial board so constituted *have always been in the possession of the property through their tenants*. To show how thoroughly this was the case at the date of the passing of the Statute 1845, I, in place of all other evidence to the same effect, quote the following passages from the lease which was then current. It is dated 28th August and 2d September 1844, and it bears to have been entered into ‘betwixt John Balfour, Esq. of Balbirnie, as nominated by a meeting of the heritors and kirk-session of Kinglassie parish, held there on the 16th day of February 1814, for himself and the other heritors of the said parish, and the Rev. John Macpherson Cunnyngame, minister and moderator of the kirk-session of Kinglassie, administrators of the poor of that parish, on the one part, and Charles Gardner, present tenant of the farm of Ramore, belonging to the poor of Kinglassie parish, on the other part, in manner following; that is to say, John Balfour, Esq., and the said Rev. John Macpherson Cunnyngame, as representatives of the other administrators of the poor of the said parish,’ have let, &c., the lands of Ramore for nineteen years from Martinmas following 1844. And, on the other part, Mr Gardner became bound to pay the yearly rent of £100 sterling, to the said John Balfour, Esq., and the Rev. John Macpherson Cunnyngame, as representatives and administrators for the poor, or to their successors in office, or treasurer appointed by them for the poor of the parish of Kinglassie, and for their behoof.’ Mr Cunnyngame was authorised by a meeting of the kirk-session, dated 16th February 1844, to sign that lease on behalf of the session; and it was signed by Mr Balfour and him. And such having been the footing upon which this tenement was actually possessed at the date when the Poor-Law Amendment Act was passed in August 1845, as well as formerly and subsequently, I hold it to be conclusively established that, although the feudal title was standing in the name of only certain members of the kirk-session, for the use and behoof of the poor of the parish, it was so vested in their persons for the use and behoof of that class of the poor whose affairs were administered by the parochial board.

“And accordingly, at the first statutory meeting of the parochial board of this parish which was held after the passing of the Act of 1845, this property was expressly recognised as belonging to that board. It was the duty of that meeting (which was held under the authority of the Board of Supervision on 21st November 1845) to determine whether or not it would impose an assessment in order to raise funds for support of the legal poor; and the resolution of the meeting was that it should not impose an assessment, in respect that they had about £40 in hand, and ‘more especially as they have a fund of about £100 per annum, arising from the farm of Ramore, belonging to the kirk-session, applicable to the support of the poor.’ And therefore, accordingly, the property and its rents continued to be administered as before as belonging to the parochial board, as administrators of the funds of the legal poor.

“I thus think that the usage which has followed on the title by which this trust was constituted, and under which it was held at the time of the passing of the Act of 1845, and the manner in which it has been possessed and dealt with, satisfactorily explain that, according to its true import, the trust thereby created was for behoof of the poor of the parish, in the sense of the 52d section of the Poor-Law Amendment Act; and that, therefore, the in-

terlocutor of the Lord Ordinary ought to be adhered to."

LORD ORMDALE returned an opinion as follows:—

"It appears to me that this case can be best considered with reference to these two questions:—1st, Who are entitled to the benefit of the disputed property? and, 2nd, Who are entitled to its charge and administration?"

"1. The disputed property consists of a farm, the title to which was in 1726 taken in favour of the then minister, and certain persons expressly named, 'elders and members of the kirk-session of Kinglassie, and their successors in office from time to time as ministers and elders of the said kirk-session, for the use of the poor of said parish;' and these were the terms of the title by which it continued to be held down to the passing of the Poor-Law Amendment Act in 1845. So far no question has been raised; and it is assumed in the argument on both sides as not admitting of controversy, that there was thus a trust constituted for 'the use of the poor of the said parish.' But the title gives no farther or more precise definition of 'the poor of the said parish' than these words themselves imply. It was apparently assumed that 'the poor of a parish' denoted a class of persons so well known and understood as not to require any other description.

"That there were in 1726, as there is still, a class of persons who may be denominated the legal poor, who were and are entitled as matter of right to parochial relief, is certain and indisputable. Is that the class of persons for whose use, 'as the poor of the said parish,' the property in question was acquired in 1726, and has been held ever since, as contended for by the pursuers? or, Were others intended to be comprehended, who, although not of the class legally entitled to parochial relief, are yet in a reasonable sense poor persons, for whose benefit the minister and kirk-session might, in the exercise of a prudent discretion, administer the trust which was committed to them? These are important inquiries; and on a right determination of them depends in a great measure the ulterior question, to be afterwards dealt with, Whether the disputed property must now be held to fall under the administration of the Parochial Board of Kinglassie, in virtue of the Poor-Law Amendment Act?"

"As already remarked, there is nothing in the title to the property bearing on this matter beyond the expression 'the poor of the said parish;' and just as little is there in the title any discretion whatever expressly conferred on the trustees as regards the application of the rents or revenues arising from the property. This being so, and keeping in view that in 1726, when the property came first to be vested in the minister and kirk-session of Kinglassie for the use of the poor of that parish, there was a certain class of persons then, as now, and all along, who alone had a right to legal recognition as the poor of the parish entitled to relief. I think that, *prima facie* at least, that was the class, and no other, intended to be benefited.

"The expression, the 'poor of a parish,' has, in my apprehension, a well-known and long-established meaning, which nothing but express declaration, or other strong indication to the contrary, can entitle a Court to disregard or depart from. Although in the older Acts of Parliament, such as the Act 1579, c. 74, while the expressions denoting the class of persons entitled to parochial relief are somewhat vague, such as the 'pure,' 'the pure and impotent,' and 'aged, impotent, and pure persons,'

in all the Proclamations and Acts towards and subsequent to the end of the century—for example, the Proclamations of 11th August 1692, 19th August 1693, 31st July 1694, and 3d March 1698, the Acts 1695, c. 43; 1696, c. 29; 1698, c. 21, and the Poor-Law Amendment Act, 8 and 9 Vict., c. 83—the expression used is simply 'the poor,' or 'the poor of the parish,' just as in the title to the property now in dispute. Many questions have no doubt occurred regarding the right of individuals to parochial relief, that is to say, as to whether they belonged to the class recognised in law as the poor of the parish, who alone could maintain a legal claim to relief; as, for example, in the well-known cases of *M'William v. Adams* and *Lindsay v. M'Tear* (11 D., 719, and M'Queen's Appeal Cases, pp. 120 and 155), where the question was, whether able-bodied men in destitute circumstances from want of employment, or their families, were to be held as among the class of poor entitled to parochial relief. And still more recently the question was raised, in the case of *Isdale v. Jack* (2 M'P., 978, and The Law Reports, vol. i, part i, Scotch Appeals), whether a parochial board was entitled, although not bound, to expend the funds raised by assessment under the Poor-Law Amendment Act upon the relief of able-bodied poor. It was, however, finally and conclusively settled in these cases that neither able-bodied men nor their families are or ever were entitled as matter of right to relief, and that parochial boards the have no discretionary power in the matter, but funds must, and were always bound, to apply the funds raised for the poor of the parish—to the support inclusively of that class who are 'the poor,' entitled as matter of right to parochial relief.

It cannot, therefore, be now questioned that the class of persons comprised by 'the poor of a parish' under the statutory Poor-Law of Scotland—and there is nothing but statutory law, as interpreted by judicial decisions, relating to the subject—must be held to have been one and the same ever since the date of the old Act 1579, c. 14, which may be said to be the foundation of the poor-law of Scotland. Having regard, then, to this consideration, and to the fact, that according to the title to the property now in dispute, it was in 1627 vested, and has ever since been held in trust 'for the use of the poor of the parish of Kinglassie,' without condition or qualification, I think that the only reasonable conclusion that can be arrived at is, that it was the legal poor of the parish—or, in other words, those persons entitled as matter of right to parochial relief, and none other—were intended to be benefited.

"The Proclamation of 29th August 1693, and the 54th section of the Poor-Law Amendment Act of 1845, relating to church-door collections, are calculated, I think, to confirm, rather than invalidate, the views I have now expressed, for they show that special provision was necessary to authorise the diversion of any part of such collections from the support of that class of persons which alone is recognised as the poor of a parish entitled, as matter of right, to relief.

"Nor have I been able to satisfy myself that there is anything in the present case which renders it either competent or necessary to enter into any inquiry as to the sources from which the funds were derived which were employed in the purchase of the disputed property in 1726, or as to the manner in which its rents or revenues have been since applied. No such inquiry can, in my opinion, be entered into without trenching upon the well-es-

tablished principle, that extrinsic evidence is inadmissible to explain or control the legal construction of a written instrument, in itself sufficiently clear and explicit.

"If indeed an inquiry into the sources of the funds wherewith the disputed property was originally acquired, or as to the objects to which its rents have been since applied, were admissible on the footing and to the effect contended for by the defenders, just observe what results might follow:—According to their statement in the record, the disputed property was purchased with 'funds held by the kirk-session for pious purposes within the parish. These funds have never been applied, nor has any one ever proposed that they should be applied, to the support of only the legal poor. For a period long anterior to the purchase of the said lands, the revenue derived from the funds in the hands of the kirk-session was applied by them at their discretion, and without interference on the part of any one, for the aid and relief of the poor generally, although not falling within the technical description of destitute poor, as well as for other pious purposes. Subsequent to the purchase of the said lands, the kirk-session received the rents, and used and applied them in the same manner.' This statement, so far as its obvious inconsistency admits of any definite meaning, very forcibly shows, in my view of it, the irrelevancy of any such inquiry as that to which it points; for while it bears that the disputed property was purchased '*with funds held by the kirk-session for pious purposes within the parish,*' it also very consistently bears that these funds, before the property was purchased, as well as all other funds held by the kirk-session, were *both before and after the purchase applied 'at their discretion,' not exclusively for pious purposes, but for the aid and relief of the poor generally,* 'although not falling within the technical description of the destitute poor, *as well as for other pious purposes.*' It is obvious, I think, that any inquiry conducted on the basis of such a statement—and it is the only one made by the defenders on the subject—would be alike irrelevant and unavailing. The only title by which the property in question has been all along held by the minister and kirk-session, expressly bears that it has been vested in them '*for the use and behoof of the poor of said parish*' alone, without the slightest allusion to any '*pious purposes,*' whatever, and without the slightest indication that they were to have any discretion in the matter. If, then, it be the fact that the parochial funds in charge of the minister and kirk-session of Kinglassie for the support of the poor of the parish have been applied at their discretion, or more probably their caprice, to the support of any persons they were pleased to consider to be in poor circumstances, and '*for other pious purposes,*' such as,—according to what is stated by them in their written argument,—'*stranger poor,*' '*common beggars,*' '*distressed persons in other parishes,*' '*a person whose house had been burned, to purchase an article of furniture,*' '*an allowance to a feuar of two pounds sterling to repair his feu,*' '*the presbytery bursar,*' '*Highland bursar,*' '*students of divinity,*' '*a person for officiating as a precentor,*' and '*synod and presbytery and Assembly clerks,*' the latter kind of disbursements, as well as those to precentors, having, the defenders add, '*continued during the whole of the eighteenth century,*'—I should say without hesitation that such an application of such funds was quite unwarrantable, and that no usage, however long, could legalise or jus-

tify a continuance of such an abuse or perversion of the objects and purposes of a trust for charitable purposes. I may further remark, that nothing could better illustrate the dangerous consequences of holding that a kirk-session, to whom has been committed the charge of a fund '*for the use of the poor of the parish,*' have a right to apply it for the benefit of such persons as they in their discretion may be pleased to consider poor, than the account thus given by the defenders of the way in which the funds in question have been hitherto administered and applied.

"The course which has followed, and the judgments pronounced by the Court in the *Bathgate* and *Linlithgow* cases, are, I must own, scarcely reconcilable with the views which have now been expressed by me; for in both of these cases the sources of the disputed funds, and the manner in which they had been in use to be applied, would appear to have been inquired into, and by the results of the inquiry the decisions of the Court would appear to have been in a great measure regulated. But independently of the difference in the terms of the constitution of the trust in these cases—which goes far to distinguish them from the present—there is the important circumstance that the decision in the case of *Isdale v. Jack* was subsequently pronounced, correcting an erroneous impression which had previously prevailed, to the effect that under the Act 8 and 9 Vict., c. 82, there was a class of poor persons, besides those entitled to parochial relief as of right, to whom a parochial board might, in the exercise of a discretionary power, apply the funds under their charge. That this erroneous impression operated to a considerable extent in leading to the judgments which were pronounced in the *Bathgate* and *Linlithgow* cases is obvious, from the reported opinions of the Judges, and more particularly from that of Lord Rutherford. According to the report, that learned Judge said that his opinion, to the effect that the disputed funds might be applied for the benefit of persons other than the legal poor, was perfectly in agreement '*with the Act of Parliament, because in the Act other poor than the proper poor of the parish are recognised.*' For in the case of persons not legally entitled to relief, it legalises the application of the poor funds for their benefit, although it withholds from them the right to demand it. It even goes further, for it leaves the administration of the church-door funds with the kirk-session. Therefore, when I find the testator giving £3000 to trustees, to the exclusion of the parochial board, and adding that the legacy should be for the benefit of the poor in the parish, I think it is not to be interpreted as referring absolutely either to the proper poor on the one hand, or to the poor not legally chargeable on the parish on the other hand.' If, then, the erroneous impression corrected by the judgment of the House of Lords in *Isdale v. Jack* had not existed when the *Linlithgow* and *Bathgate* cases were decided, it is by no means certain that these cases would have been decided as they were, or that the course of inquiry adopted in them would have been followed. Be that, however, as it may, I have found it impossible to accept of the decisions in these cases as precedents which must govern the present.

"I need scarcely add, that I cannot look upon the present case as involving, as has been suggested, a question of evidence only; and I cannot indeed for a moment suppose that, if such had been considered the nature of the question to be

decided, it would have been thought necessary or proper to take the opinion of the whole Court on the subject.

"At the same time, and supposing that an inquiry into the original sources of the property in question, and the subsequent application of its rents, were competent and necessary, and that a consideration of the evidence which has been brought to bear on the disputed questions in the present case was to be gone into, I should be inclined to think that the Lord Ordinary's estimate of that evidence is correct, and that accordingly, its true import and effect is to confirm the opinion I have otherwise come to, viz., that the property in dispute must be dealt with as being now, and all along since 1726, held for the use of the legal poor only of the parish of Kinglassie.

"II. There yet remains, however, the question whether, in virtue of the Poor-Law Amendment Act, the 8 and 9 Vict., c. 83, the disputed property must now be held to belong to, and to fall under the administration of, the heritors and kirk-session of Kinglassie; or whether it is to be held as belonging to, and falling to be administered by, the minister and kirk-session of that parish alone?

"This matter depends upon the proper construction of section 52 of the Poor-Law Amendment Act, 8 and 9 Vict., c. 83, which provides—'That where any property whatsoever, whether heritable or moveable, or any revenues, shall, at the time of the passing of this Act, belong to or be vested in the heritors and kirk-session of any parish, or the magistrates and Town Council of any burgh, or commissioners, or trustees, or other persons, on behalf of the heritors and kirk-session or magistrates, or magistrates and Town Council, under any Act of Parliament, or under any law or usage, or in virtue of gift, grant, bequest, or otherwise, for the use or benefit of the poor of such parish or burgh, it shall form, and after a time to be fixed by the Board of Supervision, be lawful for the parochial board of each such parish, or of the combination in which such parish or burgh may be respectively, to receive and administer such property and revenues, and the right thereto shall be vested in the parochial board.'

"In considering whether and how far this enactment can be held to apply to and comprehend the property in question, it is of importance to inquire whether the disputed property had, prior to the passing of the Poor-Law Amendment Act, in reality belonged to, and in law fell under the administration of, not the minister and kirk-session merely of Kinglassie, but of the heritors and kirk-session? Now although, according to the *ipsissima verba* of the title, the property belonged to, and was vested in, the minister and kirk-session alone, still it is plain, and the title expressly bears, that it so belonged to and was vested in these parties, not for themselves or for their own enjoyment, but in trust—and the Act of 1696 interposes no difficulty in regard to this—for the use of the poor of the parish. That being so, it appears to me necessarily to follow that the property must be held in law to have belonged to, and been vested, so far as the management and administration of it was concerned, in the minister and kirk-session on behalf of the heritors as well as themselves; for nothing can be more clearly or better established than that, prior to the passing of the Act 8 and 9 Vict., c. 83, all funds or property belonging to the poor of a parish were in law, unless otherwise very specially provided, held on behalf of the heritors as well as the kirk-session,

as the administrators thereof for the poor. Whatever uncertainty there may have been in regard to this previously, there could have been none after the judgment of the Court in the *Humbie* case, by which it was expressly decided 'that the heritors have a joint right and power with the kirk-session in the administration, management, and distribution of all and every of the funds belonging to the poor of the parish, as well collections as sums mortified for the use of the poor, and money stocked out upon interest.'

"I cannot doubt, therefore, that at the passing of the 8 and 9 Vict., c. 83, the heritors had a joint right and power with the kirk-session in the administration, management, and distribution of the property now in question, and the rents or revenues thereof, for the use of the poor of Kinglassie; and if so, I can have as little doubt that the property must, at the passing of the Act, be held to have belonged to, or been vested in, the minister and kirk-session of Kinglassie, in the words of the Act, 'on behalf of the heritors and kirk-session, for the use or benefit of the poor' of that parish.

"Nor do I think it is either competent or necessary, in regard to the question, who are the parties entitled to the administration of the property, any more than in regard to the question, who are entitled to the benefit of it, to enter into any inquiry as to what has been the past usage bearing on the matter. Such usage cannot, I think, affect, much less destroy, the legal right and title of the heritors, as established by the statutory and established law of the country, to participate jointly with the minister and kirk-session in—to use the words of the judgment in the *Humbie* case—'the administration, management, and distribution of all and every of the funds belonging to the poor of the parish' of Kinglassie. Accordingly, I find, in what is called the *Cardross* case—not adverted to by either party in the present discussion—briefly noticed in a footnote to the report of the case of the *Earl of Galloway* against the *Minister and Kirk-Session of Dalry*, in the Faculty Collection, of date 22d February 1810, that usage was disregarded as affecting or controlling the right of the heritors. The notice I refer to of the *Cardross* case is as follows:—'A sum of money was left by a lady in England to a certain district of the parish of Cardross, under the management of the *patrons or overseers of the poor of said place*. The money was recovered by the minister and elders of the parish, and managed by them in conjunction with the heritors of the district. The other heritors of the parish had not interfered for nearly eighty years, and on their doing so their claim was resisted. They brought an action to have their joint right of management ascertained, and were successful in their object.' So also do I think the pursuer in this case ought to be successful in his object.

"I have only to add, as I did in reference to the question who were to be considered 'the poor' entitled to the benefit of the fund, that if any inquiry into the usage, and a consideration of the evidence as to the parties charged with the administration of it, were competent and necessary, the result I would in that view arrive at is the same as that expressed by the Lord Ordinary in the note to his interlocutor.

"For the reasons I have now stated, I am of opinion that the interlocutor of the Lord Ordinary is right, and ought to be adhered to."

All the other Judges arrived at the same result as LORD KRIBLOCH. His Lordship returned the following opinion as a consulted Judge:—

"I retain the opinion embodied in my interlocutor and note. I do not think the deed of 1726 incapable of construction by extrinsic evidence. But I conceive that the trust thereby constituted in the kirk-session of Kinglassie, 'for the use and behoof of the poor of the said parish,' is *prima facie*, and presumptively, a trust for the legal poor; and that the *onus* lies on the kirk-session to establish that the trust was truly intended for a discretionary distribution by the session, apart from the heritors, amongst persons within the parish in a state of poverty, whether possessing a legal claim of relief or not. I am of opinion that the evidence, rightly construed, not only fails to make this out, but directly makes out the reverse. The original intervention of the heritors in the purchase of the property,—the share which they took from time to time in its administration,—the mode in which they were ultimately united with the session in granting the leases,—and the application of the rents to the relief of the legal poor, by no special appropriation of the session, but indiscriminately with the other parochial funds, and especially with the assessment which the heritors voluntarily laid on themselves (which, although perhaps inaccurately termed the legal assessment, stood in exactly the same position of being raised to meet the legal demand),—are circumstances which I think unanswerably confirm the inference presumptively deducible from the terms of the disposition, that this property 'belonged to the heritors and kirk-session of the parish of Kinglassie,' in the true construction and meaning of the Poor-Law Amendment Act."

At advising—

LORD COWAN—The consulted Judges are all agreed in holding that the interlocutor of the Lord Ordinary is well founded. I concur in that opinion, on the grounds more particularly set forth in the opinions of Lord Curriehill and Lord Deas.

To reach this result, it never has appeared to me necessary to challenge the authority of the decision by the First Division of the Court in the case of *Hardie v. Kirk-Session of Linlithgow*. That case was decided upon the result of the inquiry, allowed by Lord Rutherford, Ordinary, "into the administration of the property there in question," "by whom administered, and under what control," and "for what objects." Such investigation was held to be necessary from the terms of the title, by which the subjects had been in 1707 disposed to the then Eleemosynary for the poor of the parish, "for the use and behoof of the kirk-session of Linlithgow and the poor of the said parish." The terms of this title were not such as *de plano* to vest the property in the parochial board of the parish, under the 52d section of the Poor Law Statute 1845—the provision in its terms being limited to property held, directly or through trustees or commissioners," "by the heritors and kirk-session of any parish," "for the use or benefit of the poor of such parish." But while this was true, there was nevertheless room for holding that under the title the estate had been managed and distributed throughout for the use and behoof of the legal poor of the parish. The allegations of the parochial board to that effect, with the counter allegations on the part of the kirk-session, behoved, in consequence, to be investigated for the just decision of the cause. The result was to satisfy the Court that the kirk-session had held and administered the fund for the general poor, including the casual or occasional poor, and not for those poor only who were entitled to legal relief. The

principle on which the Court proceeded in disposing of that case appears to me quite sound, whatever may be thought of the view taken by the Court of the result of the investigation into the respective allegations of the parties.

The same principle must, in my opinion, be applied in this case. The terms of the title are not such as to bring the property *de plano* within the express terms of the statutory provision, transferring the management of the poor's funds of the parish to the parochial board. But the terms of the title are such as to justify investigation into the history, management, and application of the subjects by the kirk-session who are the holders of it "for the use and behoof of the poor of the parish." Had there been nothing to reflect light on the origin and history of this property and its management, the statutory terms of themselves might not have carried it to the parochial board, on the principle stated by the Lord President in the case of *Linlithgow*. But adopting that view as applicable to the present case, the result of the elaborate investigation which has been gone into appears to me inevitably to lead to a different conclusion.

On these grounds, I am of opinion that the decision of this case in conformity with the opinions of the consulted Judges not only does not conflict with the principle on which the Court decided the case of *Linlithgow*, but will be in perfect conformity with that principle and with the sound construction of the statutory provision, when its application is sought to be enforced in such circumstances as the present case presents.

LORD BERNHOLME—I concur in the opinion of Lord Ordmidale.

LORD NEAVES concurred.

LORD JUSTICE-CLERK concurred.

The interlocutor of the Lord Ordinary was accordingly adhered to; but without expenses to either party.

Agents for Pursuers—J. & H. G. Gibson, W.S.

Agent for Defenders—John Thomson, S.S.C.

Friday, June 14.

## SECOND DIVISION.

JOHNSTON v. PETTIGREW.

*Bankrupt—Trustee—Heritable Securities—Bond and Disposition—Assignment—8 and 9 Vict., c. 31—Recording Titles to Land Act 1858—Registration.* A party acquired two bonds and dispositions in security in corroboration of a disposition of lands to him. He took infettment on the disposition, but the instrument of sasine made no reference to the bonds, and they were not recorded under the Act 8 and 9 Vict., c. 31. He afterwards made a disposition of the lands and of the bonds, and that deed was registered under the Titles to Land Act. This registration was set aside by a previous judgment of the Court as an invalid title to the lands. Held, in a question with the trustee of the party who disposed the lands and the bonds together, that the right of the disponee to the bonds was merely personal, and could not compete with the trustee's completed title under the Act of 1858.

This case arose upon objection by Matthew Pettigrew, manufacturer in Glasgow, to a scheme of