

defenders, but there is no proof and no suggestion that it was not sent to and received by the defenders on or about its own date. The documentary evidence therefore comes to this, that written intimation was given to the defenders by their buyers of a sub-sale of the 20 hogsheads to one purchaser in January 1891, and that in the following month a delivery-order was presented for part of the whisky, which disclosed the purchaser to be a Mr Thomas. The parole evidence is to the same effect. Mr Davis and Mr Barker both depone to having informed Mr Ainslie, the defender, at an interview in London on 18th February 1891, that they had sold the 20 hogsheads to Mr Thomas, and "that the delivery-orders had been handed" to him. No doubt Mr Ainslie denies this. He does not deny knowledge of a sub-sale, but he says that at the interview with Davis and Barker he neither asked nor was told the name of the purchaser. But I prefer to believe that Mr Ainslie has forgotten what took place at that interview, rather than to believe that Davis and Barker are swearing to statements which (if not true) they must have invented and known to be false. I think therefore the evidence in the case shows that prior to 18th February the defenders had written intimation of the sub-sale to Mr Thomas, and that on 18th February the intimation was verbally repeated. The arrestment founded on by the defenders was used by them on 9th March 1892, a date somewhat carelessly omitted from the defenders' record, but which I find from the execution of arrestment produced. It follows that the defenders' arrestment is ineffectual in competition with the pursuers (who stand in the place and use the rights of Mr Thomas), not having been used prior to the date when the sale of the goods in question to a subsequent purchaser had been duly intimated. I am therefore of opinion that the result reached by the Lord Ordinary is right, and ought to be affirmed.

The Court affirmed the Lord Ordinary's interlocutor.

Counsel for the Reclaimers—W. Campbell—Aitken. Agents—Beveridge, Sutherland, & Smith, S.S.C.

Counsel for the Respondents—W. C. Smith—Burnet—M'Watt. Agents—Gordon, Petrie, & Shand, S.S.C.

Thursday, December 7.

SECOND DIVISION.
 PENCAITLAND KIRK-SESSION v.
 WOOD.

Poor—Parish—Heritors and Kirk-Session
 —Poor Law Amendment Act 1845 (8 and
 9 Vict. cap. 83), sec. 52.

By various personal bonds dated between 1729 and 1752 A B acknowledged to have borrowed from the kirk treasurer of a parish sums amounting to

£553, 6s. 8d., and bound himself, and his heirs, executors, and successors, to repay "to the present minister and kirk-session of the said parish, or their successors in office, in name and for the use and behoof of the poor of said parish." The heirs of A B having in 1886 paid the sums contained in these bonds, and a question having arisen between the kirk-session and the parochial board of the parish as to whether the right to administer this fund was now vested in the parochial board for behoof of the legal poor, or in the kirk-session for behoof of a wider class of poor—held (following the cases of *Kinglassie*, June 14, 1867, 5 R. 869, and *Aberdour*, November 24, 1869, 8 R. 176) that the history of the fund must be considered in order to explain the terms of the deeds, and that the history of the fund showed that it had been possessed by the heritors and kirk-session jointly for behoof of the legal poor, and that it had therefore passed to the parochial board under section 52 of the Poor Law Act of 1845.

By section 52 of the Poor Law Amendment Act 1845 (8 and 9 Vict. cap. 83) it is enacted—"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, or magistrates and town council, of any burgh, or commissioners, 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 gift, grant, bequest, or otherwise, for the use or benefit of the poor of such parish or burgh, it shall, from 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 such parochial board; and the said heritors and kirk-session, magistrates, town council, commissioners, trustees, or other persons are hereby authorised and required either to continue to hold all such property and revenues for the behoof of such parochial board, or to make, grant, subscribe, and deliver such dispositions, assignments, and conveyances of all such property and revenues as may be necessary to enable such parochial board to administer the same for the behoof of the poor of such parish or combination."

During last century, at various dates between 1729 and 1752, Alexander Hamilton of Pencaitland granted six personal bonds in favour of the minister and kirk-session of the parish of Pencaitland for sums borrowed by him from the then kirk treasurer of the poor's money of the parish, amounting in all to £553, 6s. 8d. These bonds all remained in force until 1886, when the sums therein, principal and interest, were paid by the heirs of Alexander

Hamilton to the kirk-session of Pencaitland parish and were discharged.

Thereafter a difference of opinion arose between the kirk-session and the Parochial Board of the parish of Pencaitland as to whether the kirk-session were in right of said sums, or whether the Parochial Board were entitled to administer the same in virtue of the provisions of the Poor Law Act of 1845.

For the decision of the point a special case was presented to the Court of Session by (1) The Kirk-Session, and (2) Alexander Wood, Inspector of Poor of the parish of Pencaitland, on behalf of the Parochial Board.

The parties to the special case agreed on the following statement of facts:—

“II. *As regards the source or sources from which the said sums were derived.*—All the bonds are granted in practically similar terms, and it may therefore suffice to quote the first of them as an example. This bond (No. 1) is dated 25th December 1729, and the granter, the said Alexander Hamilton, acknowledges to have ‘borrowed and received from Patrick Brown, tenant of Spilmerfoord, and present kirk treasurer of the parish of Pencaitland, on account of the poor of the said parish, All and hail the sum of four thousand three hundred merks Scots money . . . which sum I bind and oblige me, my heirs, executors, and successors, thankfully to repay and again deliver to the present minister and kirk-session of the said parish, or their successors in office, in name and for the use and behoof of the poor of said parish.’ The sum contained in the above-mentioned bond appears to have arisen from the consolidation of some monies contained in prior bonds belonging to the kirk-session, the earliest of which was dated in 1713, as there is a minute of the kirk-session of this date to the following effect:—‘The session considering that they had a considerable balance in their hands, they desired the minister to speak to my Lord Pencaitland, if he will be pleased to take it into his hand, and allow the sum of four hundred pounds Scots to be made up into the sum of one thousand merks, and that he would be pleased to give bond for it to the session’s use;’ and in a minute four days later (October 30, 1713) it is reported, ‘which bond was produced.’

“A minute of the kirk-session of this date (October 9, 1726) bears that Hamilton of Pencaitland, the younger, acquainted the session that he ‘had found it necessary to call for the 1000 merks which he had lent for the behoof of the session to Glenbervie and others, the session considering that the said 1000 merks will now to be disposed upon, and that there are some arrears due upon that and some other bonds due to the session, and that they may also spare some of the balance of this last account; therefore the session did earnestly entreat the said Alexander Hamilton to take the sum so made up into his own hands, and to grant the session his bond for the same, which he consented to do.’ The proposed consolida-

tion of the session’s funds does not appear to have been carried out for nearly three years later. The following is a quotation from the kirk-session treasurer’s account, and shows how the money contained in bond No. 1 was made up:—

	Scots Money.
‘1729, December 22.—Received from Mr Hamilton of Pencaitland payment of the 1000merks due by his father Lord Pencaitland (1713),	£666 13 4
Three years’ interest thereof to Martinmas last,	100 0 0
Bond granted by the said Mr Alexander Hamilton to the kirk-session—date 21st November 1726,	1466 13 4
Three years’ interest thereof to Martinmas last,	220 0 0
Also 600 merks left by the late Lord Pencaitland to the poor of this parish, making in all	400 0 0
	£2853 6 8’

“And on the other side of the account there is the following entry:—December 25. ‘Lent to Mr Alexander Hamilton upon bond of this date, there being added to the sum received of the 22nd to make up this principal £13, 6 8 Scots, . . . £2866 13 4, being equivalent to 4300 merks, or £238, 17 9 sterling.’

“With regard to the sums contained in the remaining bonds, the minutes of the kirk-session show that these were derived from accumulations of interest on investments in name of the kirk-session.

“The funds contained in all these bonds represent accumulations in the hands of the kirk-session derived from church-door collections, mortcloth money, ecclesiastical fines, and other moneys forming the usual sources of a kirk-session’s revenue, including certainly one legacy, and possibly one or two more, left specially to them for the benefit of the poor, and accumulations of interest upon invested balances.

“III. *As regards the persons for whose benefit the funds have been administered, and by whom the funds have been administered.*—The minute-books of the heritors do not go further back than the year 1774, and down to 1799 contain no reference to matters connected with the relief of the poor of the parish. The records of the kirk-session contain nothing to show that prior to 1711 the heritors were consulted in regard to the funds which were applied for the benefit of the poor. Mr Alexander Hamilton, however, above referred to, was the chief heritor of the parish. In that year, in a minute of date October 7th 1711, is found the first mention of joint action between the kirk-session and the heritors in maintenance of the poor. The kirk-session’s minute of that date is as follows—‘This day the session taking under their consideration an Act of the Justices of the Peace of this shire, of the date this 2nd October, appointing each parish to maintain their own poor, and that the heritors, ministers, and elders of each parish meet and agree upon funds for this end, as the Act itself more fully bears, it was agreed,

with consent of the heritors, that the meeting foresaid in this parish should be on the 22nd of October instant, and the minister is desired to acquaint the absent heritors therewith.' The following is the minute of the meeting afterwards held on 22nd October 1711 as engrossed in the minute-book of the kirk-session—'At Pencaitland Kirk, the 22nd October 1711.—After prayer. Sedt. of the heritors—the Laird of Pencaitland, the Laird of Belsis, John Wilson, writer in Edinburgh, for my Lord Fountainhall, William Bairnsfather for Sir Robert Sinclair of Stevenson, the minister, and whole elders. The Act of the Justices of the Peace, of date the 2nd October 1711, ordaining each parish to maintain their own poor, and for discouraging of vagabonds and stranger beggars, was produced and read. In compliance therewith, there was produced a list of the poor who need maintenance within the parish of Pencaitland, which being considered by the heritors, minister, and elders, they modify the soumes underwritten to be paid to the said poor, ilk one of them for their own part, as is after divided, viz.—[*Here follows list of twelve poor people, total vote, £163, 8s. Scots.*] And the meeting having considered how much of the said sum the poor-box of the said parish is able to afford yearly, it's unanimously agreed that when the sacrament is given, the session, out of their collections, do pay £100 Scots, so that there remains to be paid by the parish £63, 8s., which sum, with the constables' and collectors' fees, they are to cast upon the heritors, conform to their valued rents in the parish, and it was remitted to the heritors to think upon fit persons to be constables.'

"At an adjourned meeting, held on 27th October 1711, 'the meeting also made choice of Mr Thomas Dobie, session-clerk at Pencaitland, to be their collector.'

"IV. This arrangement continued until 1714, when the kirk-session passed the following minute, of date November 15, viz.—. . . 'The session, taking under their consideration the state of the poor, and finding how difficult it was for them to get payment of that proportion of the ordinary maintenance of the poor which had been formerly agreed upon to be paid by the heritors and their various tenants, do resolve to stretch themselves as far as possible, and to assay the maintaining the most necessitous of the said poor for one year without troubling the said heritors and their tenants therewith any further than what is advanced in the weekly collections. Then the session, taking under their consideration the roll of the said poor, did appoint their treasurer to pay quarterly the following sums in the year to the after-named persons.' It is understood that the reference in the above minute to 'what is advanced in the weekly collections' by the heritors and their tenants, means what they might choose to put into the plate on Sundays as their voluntary contributions. The next reference to joint action of the heritors and kirk-session for maintenance of the poor is found in the

records of the kirk-session under a minute of date July 28th 1728, which bears—'This day was publicly intimate in this congregation an Act of the Justices of the Peace of the shire of Haddington for maintenance of the poor within the said shire, of date 2nd July (1728), appointing the heritors, ministers, and elders of the respective parishes to meet and provide for the maintenance of their poor, and for repressing of vagrant beggars within their respective parishes, as the said Act more fully bears; and the heritors and elders in this congregation being appointed to meet for this purpose on Monday the 5th August next, the session at this meeting did advise upon what was fit for them to propose to the foresaid meeting; and they, considering that this session had hitherto supplied their own poor out of the public collection at the church door and other funds under their own management, without desiring any particular stent to be laid upon the heritors and others concerned in the parish, they did agree to continue in the same practice for the ensuing year, with this provision, that the heritors and others concerned according to the order of the foresaid Act of the Justices of the Peace, will provide a fund for maintaining a constable and for freeing the parish of vagabonds and stranger beggars, and the session remits it to the minister and clerk to give in the roll of listed poor in this parish to the foresaid meeting, and the elders were desired to attend the said meeting, and the sederunt closed with prayer.'

"V. Thereafter the minutes of the kirk-session down to the beginning of the present century show that the kirk-session continued year by year to make up by themselves a list of the poor, and to relieve them, as well as to give other poor persons not on the list occasional assistance in name of 'charity' from the income of the funds collected and administered by them, including the bonds above mentioned, leaving to the heritors the duty of providing and paying for the constable as above mentioned.

"The management of the invested funds at this period is illustrated by the following minute of the kirk-session, of date November 1, 1731.—'Sederunt, minister, and elders—'The session, considering that there are two years' interest due upon their bond of 4300 merks, which is 430 merks, they desire it as a favour of Mr Hamilton of Pencaitland that he would give himself the trouble to get the same laid out upon interest for the use of the poor, and they appoint their treasurer Dav. Richardson to advance thirteen pounds and half a merk Scots to make it up to three hundred pounds Scots.'

"A minute of the kirk-session, of date 13th November 1732, states—'Sedt. The minister, Pencaitland, Dav. Richardson, William Wilkieson, Pat. and James Browns, William Dickson, Jo. Williamson, and David Pringle in Milton—The which day the session did revise the treasurer's accounts as they stand registered in the 21st, 22nd, and 23rd folios of the money register, the charge was found to be £1420,

18s. 7d., and the discharge £1233, 4s 4d., and the balance £187, 14s. 3d., all Scots money, and they did compare the discharge with the orders of session and other vouchers, and found them just and right, and therefore the session did approve of the same, and subscribed them in the money register.' It is also stated in this minute that Mr Hamilton reported that he had got the proceeds of a sale of timber grown on the glebe and churchyard, which he suggested he should pay to the kirk-session for the behoof of the poor, 'but with this condition, that if the heritors should afterwards think fit to apply the said money for other pious purposes within the parish than for the behoof of the said poor, then and in that case the kirk-session should repay the money to the heritors.' The above extracts are fairly illustrative of the practice in these earlier times as regards the administration of the poor's funds by the kirk-session. The minute of the kirk-session of this date (April 4, 1745) runs as follows:—

'The Commissioners of Supply in county having a design to enter into some method for supplying the poor and for keeping such of them as are able to work, did appoint the heritors and session of each parish to meet together and draw up a state of their poor—there did convene Sir Robert Sinclair of Stevenson, Mr Hamilton of Pencaitland, and Mr Seton of Belsis, with the whole elders. There was laid before them the following state of the poor for the seven preceding years, which was given to the minister to deliver in to the committee of heritors and ministers at Haddington at their next meeting.'

'Collections and Disbursements of the Kirk-Session of Pencaitland, from Martinmas 1731 to Martinmas 1744.'

Year.	Collections, Scots.		No. of Listed Poor.	Disbursements on Listed Poor.		No. of Incidental Poor.	Disbursements on Incidental Poor.		Total Disbursements.
	£	s. d.		£	s. d.		£	s. d.	
1738	291	0 0	13	164	12 0	19	160	5 8	324 17 8
1739	285	2 0	16	170	12 0	17	228	8 0	399 0 0
1740	304	12 0	15	169	12 0	26	246	12 4	416 4 4
1741	262	7 5	14	185	4 0	37	339	7 4	524 11 4
1742	316	4 0	17	202	4 0	20	193	10 0	396 14 0
1743	316	13 6	17	187	8 0	16	165	1 0	352 9 0
1744	274	19 6	12	124	12 0	14	160	7 8	284 19 8
	2050	18 5	104	1204	4 0	149	1493	12 0	2698 16 0
10th	292	19 9½		172	0 6½		213	7 5½	385 5 1½

'The above table shows the number of listed as distinguished from incidental poor, and that the latter predominated during these seven years, and what the average annual disbursements were for both classes of relief during these years.

'(6) From this time until the end of the century the kirk-session continued to give relief to both classes, the listed poor receiving quarterly payments and the incidental relief being given from time to time. The total given incidentally usually exceeded by a considerable sum the total of the quarterly payments to the listed poor,

some of whom are often found receiving incidental relief. The heritors and minister and kirk-session held a joint meeting on the subject of this date, December 12, 1799, and the minute of that day, which appears in the heritors' minute-book, and which is the first minute relating to the poor which is to be found in the heritors' records, bears—

'The heritors and kirk-session having met this day at noon, agreeably to a call from the precentor's desk on the 1st curt. Present—Colonel Hamilton of Pencaitland, George Bogue, Esq. of Woodhall, the Rev. Mr Pyper, minister, for Sir Andrew Lauder Dick, Bart. of Fountainhall, the Rev. Mr Pyper, minister, Robert Hay, elder; Colonel Hamilton of Pencaitland chosen preses. The meeting having taken into consideration the state of the poor at present on the parish roll for ten months from 4th November 1799 to 4th September 1800, finds that the sum of £74, 6s. (exclusive of the funds and collections) at least will be found necessary for supporting them these ten months at the present prices of meal, have resolved to take a bill of £71, 13s. 4d. granted by the late Mrs Hamilton to the Session of Pencaitland, of date 13th November 1779, for that purpose.' The proceeds of that bill were accordingly carried into the kirk-session treasurer's account of 1799-1800, in addition to the interest on 'bonds belonging to the kirk-session,' and the expenditure of the whole upon the maintenance of the poor appears in the kirk-session treasurer's cash account.

'VII. The income of the fund in question from the commencement of the present century down to the year 1845 was not specially devoted to one class of poor. The minutes and accounts of the kirk-session subsequent to 1799 do not distinguish between listed and incidental poor, and after 1820 there is no listed poor, regularly given in the minutes of the kirk-session. The docket to the kirk-session treasurer's accounts from November 19th 1801 to August 10th 1802 is as follows:—'At Pencaitland, this 1st day of April 1803, the Kirk-Session of Pencaitland, being convened, did revise the preceding account of money belonging to the said session, both charge and discharge, as contained in the 176th and 177th pages of this register from 19th November 1801 to 10th August 1802 inclusive, and having compared them with the orders of session, discharges, and other instructions now produced before them, they find the charge, amounting to one hundred and eighty-two pounds fifteen shillings and elevenpence farthing, and the discharge, amounting to one hundred and ninety-five pounds thirteen shillings and one farthing properly stated and summed, and that a balance of £12, 17s. 1d. sterling is due to the treasurer, for which he is to take credit in next account.—In witness whereof, this docket is subscribed by the minister and elders present.' (Signed) 'David Pyper, minister, George Rate, elder, James Broomfield, session-clerk.' On the charge side of this account the following capital sums appear as uplifted along with sundry

mortcloth dues and collections at church door received :—

“1801, Nov. 19. By cash received from Colonel Hamilton in part of his bond for £175	£50 0 0
“1802, Mar. 19. By cash received from Colonel Hamilton in full of bond No. 7 for £175, with int.	50 16 8
“1802, July 4. By cash received from treasurer of Industrious Poor's Fund, being a surplus in hand	27 8 6½

Note.—The Industrious Poor's Fund here referred to was a fund specially raised by Miss Simpson, daughter of the parish minister, to provide work for the poor at a time of great distress. She acted as treasurer, and when the times improved, she handed over the balance of her fund to the kirk session as above.

“VIII. The necessity for supplementing the funds in the hands of the kirk-session available for the maintenance of the poor continued, and the heritors considered their position before allowing themselves to settle down to the regular practice of assessing themselves yearly in supplement of the kirk-session funds, as is shown by a minute in the heritor's minute-book of this date, which runs as follows:—

‘Pencaitland, April 5th 1803.—Sederunt—George Bogue, Esq. of Woodhall, preses, the Rev. Mr Pyper for Colonel Hamilton, Mr Turnbull, for Sir Andrew Lauder Dick, Mr Rate, for Mrs Johnston Brown, the Rev. Mr Pyper, minister, Mr Rate, elder, James Broomfield, session-clerk. Mr Pyper, in name of the kirk-session, laid before the meeting a state of the session funds, and of the annual expenditure of money for the support of the poor of the parish, by which it appears that the interest of money on bonds due to the session amounts to £27, 13s. 4d., and the average amount of collection and mortcloth money is £22, and that the annual expenditure in meal and money may be taken at an average of £87, 18s. 8d. It further appears from said statement that the session owes to sundries since first March last the sum of £28, 12s. 2d., and £16 more will be wanted on 1st May to defray the expenses of current quarter. The meeting having considered the statement, find it necessary to provide for these articles of charge with all convenient speed, and to prepare their way to accomplish this end they direct that the opinion of some person or persons learned in the law be obtained respecting the bonds due to the session, that it may be known to all concerned whether or not the amount of these bonds must be applied to the relief of the poor before an assessment can be legally laid on the parish for that purpose. The meeting further appoint that all the poor at present receiving aid from the session shall appear at the next meeting of heritors and kirk-session; that after considering their cases such a reduction may be made in the expenditure as the present low prices of provisions may justify. They appoint their next meeting to be held in the church on Tuesday next, the 12th curt.’ (Signed) ‘GEORGE BOGUE, Preses.’ And in the heritors' minute-book there is engrossed

a memorial laid before Mr Matthew Ross, advocate, with his opinion as follows:—

“From a minute of the heritors and kirk-session of this date (April 5, 1803), herewith produced, it appears that they are possessed of funds belonging to the poor, and which is lent out upon bond to the amount of £553, 6s. 8d., the interest of which, with the other funds arising from the collections at the church-door, &c., has been regularly applied for the support of the poor.

“For some time past the annual expenditure has far exceeded their income, and the heritors have been in the use of assessing themselves in considerable sums for the purpose of making up the deficiency, and as it appears from the minutes that a supply will be immediately required to the amount of £44, 12s. 2d., for the purpose of paying off sundry small debts which were contracted by the kirk-session for the support of the poor, and for defraying the expenses of the current quarter, they wished to be advised—

‘1st. Whether or not the amount of the bonds must be applied towards the relief of the poor before the heritors can legally lay on an additional assessment for that purpose?

Answers.

‘To 1st Qu. I am inclined to think that in so far as the stock of poor's money belonging to a parish has arisen from mortification or donation, tho' the donation should have been generally made without any special appropriation, the heritors and kirk-session are entitled, and perhaps bound, to keep the capital stock entire, at least till some time of extraordinary emergency shall occur, and, after exhausting the interest and the collections at the kirk-door, may lay on an assessment for supplying the ordinary necessities of the poor without touching the capital stock. And the same rule may apply where the stock is an ancient stock, the origin of which does not appear. But in so far as the money may have been saved within memory from collections at the church-door, from interest, or from former assessments, I conceive that all this ought to be expended before any new assessment is laid on.

‘9th April, 1803. MAT. ROSS.’

“The memorial and opinion were accordingly considered by the heritors and kirk-session at their next meeting, held on 12th April 1803, the minute of which runs as follows in the heritors' minute-book:—

“‘Pencaitland, April 12th, 1803.

‘Sederunt—Col. Hamilton, Pencaitland; Geo. Bogue, Esq. of Woodhall; John Dudgeon, Esq. of East Craig; Mr D. Key for Gen. Fletcher Campbell; the Revd. Mr Pyper, minister; James Broomfield, session-clerk; Col. Hamilton, preses,

‘In respect the opinion of Mr Ross is by no means clear and decisive upon the point in question, and as it appears a case directly similar is presently in dependence before the Court of Session, they resolve to await the decision of that case before adopting any final regulation. But as there is an

urgent necessity for money to clear off what is actually due by the kirk-session, and to answer the demand that will be necessary for the current quarter and up to the 1st August next, the meeting resolve to make a legal assessment upon the parish to the amount of £60 sterling, to be apportioned and levied according to law, without prejudice; on the contrary, expressly reserving to the meeting, so soon as the point is legally determined and fixed, that in case it shall appear the heritors have a power to uplift and apply the principal sums due by bonds for the relief of the poor, then the heritors will be entitled to receive back the sums with interest paid by them respectively in consequence of the present assessment.

Thereafter the meeting proceeded to take under consideration the persons presently upon the poor's-roll, with the allowances made to each, and having examined such of these persons themselves who were able to appear in person, and inquire into the circumstances of their respective cases, they continue the roll as it present stands. And the meeting consider themselves much obliged by the attention and trouble which the kirk-session have paid to the management of the poor, approve of their proceedings for the time past, and return their best thanks to them.

(Signed) 'JOHN HAMILTON, Pr.'

"IX. Nothing further, however, appears to have been done after receiving counsel's opinion, and the heritors and kirk-session continued to act on the principle formerly adopted, of the kirk-session making annually a report of what was required beyond the ordinary funds arising from interest of bonded money, collections at the church doors, and mortcloth dues, and the heritors assessing themselves for the difference; and the kirk-session receiving this assessment through their clerk or treasurer, and the money so received from the heritors was disbursed by the kirk-session along with the interest on the said bonds (which bonds they treated as capital) and church-door collections, and other sources of annual income already referred to. This system is very clearly illustrated by the minutes of the kirk-session of the 13th and and of the heritors of 27th May 1823, which run as follows:—

'Pencaitland, May 13th, 1823.

'Sederunt—The Revd. Mr Makellar, modr.; Messrs Simpson and Richardson, elders.

'Mr Simpson, kirk treasurer, produced his books giving an account of the funds entrusted to him for the support of the poor during the last year, and they, having been carefully examined, were found to be correct. There remains a balance in Mr Simpson's hands of £9, 18s. 2½d., which, with the ordinary funds arising from interest of bonded money, collections at the church doors, and mortcloths, will require an assessment of £60 sterling for the support of the poor during the ensuing year. The session appoints a meeting of the heritors to be held on Tuesday the 27th inst., in order to assess themselves in the above sum.

'Pencaitland, May 27th, 1823.

'Mr Richardson for Pencaitland and Winton estate; do. for Adam Bogue, Esquire of Woodhall; Mr John Rate for Mrs Johnston Brown: Mr Richardson, preses.

'From a statement laid before the meeting by the kirk-session, it appears that the expenditure for the support of the poor since the 17th of July last amounts to the sum of £91, 16s. 11d., and the ordinary funds for their support, arising from collections at the church doors, mortcloths, and interest on bonded money, amount to the sum of £58, 18s. 6d.; and, to enable the kirk-session to carry on the poor till next year, it will be necessary to have an assessment of £60. They therefore resolve to assess the heritors in the said sum, and direct the clerk to collect the same in terms of law.' (Signed) 'ROBT. RICHARDSON, Preses.'

"Similar minutes appear year by year in the minute-book of the heritors till the Disruption, when the following minute of the heritors closes the series:—

'Pencaitland, 10th June 1843.

'The heritors of this parish met here this day in accordance with a requisition made to them by their clerk. Present—The Right Honourable Lord Ruthven, Patrick Dudgeon, Esquire of Wester Pencaitland, Andrew Fletcher, Esquire of Salton, John Rate, Esquire, for Mrs Johnstone Brown; Lord Ruthven, preses. The clerk stated to the meeting that he felt himself under the necessity of calling this meeting in consequence of the peculiar circumstances in which the parish is at present placed. The kirk-session, which all along has had the administration of the poor's funds, is virtually defunct, and as he has managed the distribution of the funds for a number of years under the session's superintendence, he feels that now, there being no session at all, he cannot continue on his own responsibility to act as heretofore. In these circumstances he deemed it his duty to call the present meeting. The heritors approve of what the clerk has done in calling the present meeting, and also in so far as he has administered the poor's funds, and they appoint Messrs Dudgeon, Rate, Richardson, and Howden a committee, Mr Dudgeon convener, to co-operate with Mr Cuthbertson in the management of the poor's funds till a regular session is in the parish.

'RUTHVEN, Preses.'

"It has to be explained that a Mr Foggo was session-clerk and kirk-treasurer from 1833 to 1857, and is the clerk here referred to. He was also heritor's clerk at this time (1843). Mr Cuthbertson was an elder who apparently did not secede in 1843. At the first meeting of kirk-session after the Rev. Mr Nicholson's settlement as parish minister, held on 11th November 1843, the sederunt is stated to have been 'the Revd. Maxwell Nicholson, moderator, Mr Andrew Gray Cuthbertson, elder,' and the minute bears that 'the meeting proceeded to examine the list of enrolled paupers.' Mr Cuthbertson was lessee of the coal in the

Winton estate, and lived at Pencaitland House.

“X. It is admitted by the first parties that their predecessors in office at the time of the passing of the Poor Law Act of 1845 (8 and 9 Vict. cap. 83) acted as if they were of opinion that the 52nd section of that Act operated as a transfer of all funds held by the kirk-session for the behoof of the poor to the new parochial board. . . . Under this date (December 18, 1847) the following minute of the Parochial Board occurs—‘The board having taken into consideration the 52nd section of the Act 8 and 9 Vict. cap. 83, resolve in terms thereof, and in accordance with instructions from the Board of Supervision, that all the monies belonging to the heritors and kirk-session of this parish be now transferred from them to the Parochial Board; and the Rev. Mr Nicholson having stated to the board that as he was to be in Haddington on Tuesday first, he would take all the bonds to Mr John Richardson, solicitor there, that he may have them transferred in regular manner.’ No formal transfer, however, of the bonds was made by the first parties in favour of the Parochial Board, although the latter, after getting the custody of the bonds, drew the interest arising therefrom from the term of Martinmas 1845 to that term in 1884, and held the bonds from December 1847 up to the 7th of June 1886, when these were discharged and the proceeds paid over to the first parties as mentioned in article 11 hereof. During that period the Parochial Board applied said interest for the benefit of the statutory poor exclusively.

“XI. In the year 1886 the heirs of the said Alexander Hamilton desired to repay the sums contained in the six bonds above mentioned, and doubts having been entertained as to whether the Parochial Board or the kirk-session were entitled to receive payment and to grant a discharge for the funds, it was ultimately arranged that both the Parochial Board and the kirk-session should be made parties to it, and the discharge was granted by the kirk-session, and by the Parochial Board for all or any right or interest competent to them in the premises, on the narrative that the interest on said bonds had been paid ‘to the minister and kirk-session of said parish down to the year 1845, when, in consequence of the passing of the Poor Law Act of 1845, the administration of the funds under their charge for behoof of the poor was transferred to the Parochial Board of said parish, and that the interest on said bonds had since been paid to said Parochial Board . . . down to the term of Martinmas 1884,’ and that ‘it has been represented to us, the said Parochial Board, that the administration of the sums before mentioned was not truly affected by the said Act, and should have remained with the minister and kirk-session of said parish, and that we have agreed that the said principal sums, and the interest accrued thereon from the said term of Martinmas, should be repaid by the debtors therein to the minister and kirk-session accordingly.’

The said monies were therefore paid over to the first parties, with the consent of the Parochial Board, by the heirs of the original debtor in their bonds on this date (June 7, 1886), and have since remained in their hands—the income having been expended by them entirely on the relief of the poor. From the kirk-session’s minutes of date 19th June 1886, it appears that the minister received the sum of £586, 17s. 5d., representing £553, 6s. 8d. of principal contained in said bonds and £33, 10s. 9d. of interest, and that he was authorised to see after the investment of this amount, which he duly did, and an account of this money has been kept distinct and separate from the ordinary kirk-treasurer’s book. The fund presently amounts to £590 invested, exclusive of a small sum of accrued interest.

“XII. The present members of the Parochial Board are, however, doubtful of the correctness of the view taken by the board in 1886, that these funds should be given over to the kirk-session, and they have thought it right to have the matter judicially determined. The first parties hereby agree that the said discharge shall not be pleaded as a bar to the right of the second party to receive and administer the said fund, if legally entitled to do so in respect of the 52nd section of the Act of 1845. They maintain, however, that section 52 of the Poor Law Act 1845 did not confer a right upon the Parochial Board to receive and administer the fund in question for the relief of those poor only who have a statutory claim to relief. They further maintain that, as the funds in question were obtained by them from the sources mentioned in the foregoing statement of facts, are vested in the ‘minister and kirk-session,’ and were managed exclusively by them and employed for behoof of the occasional poor as well as the listed poor, as also set forth in said statement, they (the first parties) were not affected in their right and duty as to the said fund by section 52 of the Poor Law Act of 1845, and that the action of the Parochial Board and kirk-session in 1886, as set forth in article 11, was right. They claim to be entitled to hold and administer the fund for the benefit of the poor—occasional or not—as they think best in the discharge of the functions of a kirk-session. The second party contends that the 52nd section of the Poor Law Act of 1845 operated as a transfer to the Parochial Board of said funds, and that said Act confers on the Board the right to demand and receive payment thereof from the first parties, and to administer the capital or income for behoof of the poor having a statutory claim for relief.”

The question of law was as follows:—“Did the 52nd section of the Poor Law Act of 1845 vest in the Parochial Board a right to receive and administer the fund in question?”

Argued for the first parties—This fund was vested in the kirk-session, and fell to be administered by them. Both the phraseology of the bonds and the history of the fund showed that the fund belonged from

the commencement to the kirk-session, and had been distributed by them among a much larger class than the legal poor, or those entitled to relief from the rates. The fund was therefore not transferred to the Parochial Board by the Poor Law Act of 1845, but remained in the administration of the kirk-session—*Liddle v. Kirk-Session of Bathgate*, July 14, 1854, 16 D. 1075, opinion of Lord Rutherford, 1082; *Hendie v. Kirk-Session of Linlithgow*, November 15, 1855, 18 D. 37, opinion of Lord President M'Neill, 40. The second party was here *in petitorio*, and must clearly establish his case in order to succeed.

Argued for the second party—It was not disputed that the language of the deed was ambiguous, and that it was necessary to go into the history of the case to decide upon the body who were entitled to administer the funds. But the first was not *in petitorio*; the words bore that the money was “for the use and behoof of the poor of the parish,” and that, *prima facie*, showed it was held for the benefit of the legal poor—Opinion of Lord Rutherford in the *Bathgate* case, *supra*, 16 D. 1082; and opinion of Lord Kinloch in the *Aberdour* case, *infra*, 8 Macph. 184. It therefore lay upon the first parties to make out that the fund did not pass to the Parochial Board under the Act of 1845. The case was ruled by the decisions in the case of *Inspector of Kinglassie v. Kirk-Session of Kinglassie*, June 14, 1867, 5 Macph. 869; and *Flockhart v. Kirk-Session of Aberdour*, November 24, 1869, 8 Macph. 176. The tests in this last case were (1)—What was the title; (2) what was the source of the fund; (3) what had been the course of administration; and (4) the control exercised by the heritors. As regards the first two tests in the case of *Aberdour*, they were exactly the same as in the present, while as regards the third and fourth, the Parochial Board was in a stronger position in this case, because in the *Aberdour* case there was very slight evidence that the heritors had interfered with the administration of the fund, while here it was clear that they did so consistently from 1711.

At advising—

LORD JUSTICE-CLERK—The sums of money here in question came into the hands of the kirk-session of Pencaitland in name and for the use and behoof of the poor of the said parish, and in the cases which have been decided already the Court have always considered the history of a fund so coming into the hands of a kirk-session for behoof of the poor of the parish in order to ascertain upon what footing the kirk-session held the fund. In the cases of *Kinglassie* and *Aberdour*, the Court having considered the history of the fund, held that the fund, though in name of the kirk-session, truly belonged to the then parochial board—the heritors, and kirk-session—for behoof of the “legal poor,” and therefore fell under the 52nd section of the Poor Law Act 1845, and was transferred by that Act to the parochial board. In this case it does appear that in early times,

and for a considerable period, the kirk-session acted alone; indeed, till the year 1711 the records of the kirk-session contain nothing that would indicate that the heritors took any part in the management of the fund. In 1711, however, there is found evidence of joint action. The minute of 22nd October 1711 bears—“The Act of the Justices of Peace, of date the 2nd of October 1711, ordaining each parish to maintain their own poor, and for discouraging of vagabonds and stranger beggars, was produced and read. In compliance therewith there was produced a list of the poor who need maintenance within the parish of Pencaitland, which being considered by the heritors, minister, and elders, they modify the soumes underwritten to be paid to the said poor, ilk one of them for their own part as is after divided.” Now, that plainly is a proceeding by which the heritors and kirk-session took action together for the relief of the legal poor, and at the same meeting the minute bears that a sum of £100 Scots was ordered to be paid by the kirk-session, the heritors on the other hand assessing themselves for £63 odds. Then in 1728 we find from a minute of the kirk-session, under date July 28th 1728, that in accordance with an Act of the Justices of the Peace of the shire of Haddington for maintenance of the poor within the said shire, of date 2nd July 1728, appointing the heritors, ministers, and elders of the respective parishes to meet and provide for the maintenance of their poor, and for repressing of vagrant beggars within their respective parishes as the said Act more fully bears, the session did advise upon what was fit for them to propose at the meeting of the heritors, ministers, and elders which was appointed to be held, and accordingly what they advised was, that as the funds which they had charge of were sufficient to meet the management of the poor, there was no need to do anything more, provided the heritors would provide a constable to keep the parish free of “vagabonds and stranger beggars.” Apparently for some considerable time after this the actual work was done by the kirk-session, and the funds being sufficient, there was no need for any special calling together of the heritors. We also find in a subsequent minute that the heritors expressed their thanks to the kirk-session for doing the work. In 1799, again, there was a meeting at which several of the heritors were present, and some of them were represented by mandatories, and they took into consideration the state of the poor, and found “that the sum of £74, 6s. (exclusive of the funds and collections) at least will be found necessary for supporting them (the poor).” Accordingly they resolved to take a bill for that purpose. Now, that was a joint action dealing with the funds which were in the hands of the kirk-session, and providing other funds to meet a deficiency.

In 1803 we find a meeting was held at which the heritors, minister, and session-clerk were present, and it was there inti-

mated that the income from the bonds would be insufficient to meet the charges for the relief of the poor for the year, and accordingly the meeting directed that the opinion of counsel should be taken upon the point, whether or not the amount of the bonds should be applied to the relief of the poor before an assessment could be legally laid on the parish for that purpose. Accordingly a memorial was laid before counsel, and the question asked at counsel was, whether or not the amount of the bonds must be applied to the relief of the poor before the heritors could lay on a legal assessment for the purpose? That question could only be asked on the footing that the sums in these bonds were for the relief of the poor for whom the kirk-session and heritors were liable, and the question asked was, whether they could assess the parish while they had this available sum? That seems to me a plain negation of the argument that at that time these sums were looked upon as being entirely subject to the will of the kirk-session. It is clear that at that time there was no dispute that these bonds were held for behoof of the ordinary poor of the parish. After that a report was made from time to time by the kirk-session as to the state of the funds, and the heritors assessed themselves from time to time for such sum as was necessary to make up the amount required. This is all in absolute consistency with the case of *Kinglassie*, which was considered by the Whole Court, and decided unanimously. I have therefore no doubt in this case, and following the decisions in the *Kinglassie* and *Aberdour* cases, think that we must answer this question in the affirmative.

LORD YOUNG—I am of opinion that the fund in question was at the date of the passing of the Poor Law Act 1845 vested in the heritors and kirk-session of Pencaitland “for the use or benefit of the poor of the parish.” I do not think it is at all material that one of the bonds was to the kirk-treasurer for the time being for the use and behoof of the poor of the parish, and that others are in favour of the kirk-session for behoof of the poor of the parish, for I think that looking to the whole history of the fund which is given distinctly in the case before us, so far as it was vested in the kirk-treasurer or kirk-session, to use the language of the statute, it was vested “in trustees or other parties on behalf of the heritors and kirk-session.” I think the kirk-session held the funds on behalf of the heritors and kirk-session as the legal guardians of the poor, and the legal administrators of the funds for the use and benefit of the poor, and that if any question of that kind had arisen prior to 1845, it would have been decided that these funds were vested in the kirk-session on behalf of the heritors and kirk-session of the parish as the legal guardians of and administrators for the poor of the parish. If I am right as to this, there is an end of the case, because the statute states that where any property shall, at the time of the passing of the Act,

belong to or be vested in the heritors and kirk-session of any parish for the use or benefit of the poor of such parish, it shall be lawful for the parochial board of each such parish to receive and administer such property. My opinion therefore is, without any doubt or difficulty, and irrespective of any decision in the matter, that the Parochial Board is entitled and bound to receive and administer these funds, and I am also of opinion that the decisions are all to this effect, although there is language in some of the Judges’ opinions which I would not have used.

LORD RUTHERFURD CLARK—I think we must follow the cases of *Kinglassie* and *Aberdour*, and following these cases, I must decide in favour of the Parochial Board.

LORD TRAYNER—Looking to the cases of *Kinglassie* and *Aberdour*, I think the question put to us should be answered in the affirmative.

The Court answered the question in the affirmative.

Counsel for First Parties—Sym. Agents—W. & J. Cook, W.S.

Counsel for Second Party—Maconochie. Agents—W. & J. Cook, W.S.

Friday, December 8.

FIRST DIVISION.

[Lord Kyllachy, Ordinary.

DONALDS v. HODGART’S TRUSTEES.

Trust—Liability of Trustees—Goodwill of Business.

A was for a number of years in business in India as an engineer. During this period he acquired a name in connection with machinery for pressing cotton into bales, and was in the habit of supplying presses to the order of customers in India, getting them manufactured in this country and selling them at a profit to the Indian buyer. He returned to this country in 1867, but continued to supply presses to customers in India until his death in 1879, and made a considerable yearly income out of this business. He had no premises, plant, or establishment, but he kept books, including letter-books. He also left some plans and drawings of machinery.

Sometime after his death, A’s trustees were called upon by certain of the beneficiaries under his will to account for the value of the goodwill of his business. It appeared that no attempt had been made by the trustees to sell A’s business, but that two years after his death one of the trustees had assumed the title of A’s successor. The evidence also showed that a business connection in India was of peculiar value owing to