directly or by implication. The second sub-section of that clause has been repealed, but that sub-section deals only with the penalty incurred by a contravention of the bye-law, not with the bye-law itself; and in place of the sub-section so repealed another clause has been enacted.

And this brings me to notice the only other objection maintained by the respondents to the bye-law which requires attention. In the bye-law we are dealing with there was a clause intimating that anyone contravening the same would be liable in a penalty not exceeding £5 for a first offence, and not exceeding £20 for any subsequent offence. That was a correct statement of the statutory penalty as the law stood at the date when the bye-law was issued, but is incorrect as the law now stands. The penalty now incurred by a contravention of the bye-law is a sum not exceeding £100. In these circumstances the respondents maintain that the bye-law is inoperative, because the only penalty mentioned in the bye-law having been repealed, the bye-law contains no sanction, and that under this bye-law no other penalty could be concluded for or enforced except that which the bye-law has set forth.

This argument proceeds upon the view that the intimation of the penalty to be incurred by contravention of the bye-law is a part (and indeed essential part) of the bye-law itself. This, however, is not so. The Fishery Board had no authority to make any bye-law about the penalty. That was fixed by statute in 1889 as it was again by the statute in 1895. The clause in the bye-law regarding the amount of the penalty was of no authority; it was nothing more than a mere notice of what the statute had then fixed, and was no more a part of the bye-law than if it had been appended as a note to the bye-law or been published separately from it. The altogether unauthorised statement about the penalty did not invalidate the bye-law as authorised by statute. As I have said, it was no part of the bye-law.

Nor is the bye-law without sanction. The Act of 1895 repealing the formerly existing penalty clause has enacted another which is "substituted therefor." We have therefore a good bye-law with a statutory sanction, and for a contravention of the one the other may be concluded for and enforced.

The result of my opinion is that the complaint against the respondent Rust is both competent and relevant, and that the objections taken thereto should have been repelled. The complaint against Smith was I think incompetent, as it concluded for a penalty other than the statutory penalty.

LORD ADAM and LORD KYLLACHY concurred in the opinion of the LORD JUSTICE-GENERAL.

The following interlocutors were pronounced:—

In the case of Rust—"Answer the first question in the case in the negative, and the second question in the affirmative: Sustain the appeal: Reverse the determination of the inferior Judge: Find no expenses due." In the case of MacKenzie—"Answer both questions in the case in the negative: Dismiss the appeal, and decern: Find the respondent entitled to expenses" &c.

Counsel for the Appellant—Solicitor-General Graham Murray, Q.C.—Ferguson. Agent—W. J. Dundas, W.S., Crown Agent.

Counsel for the Respondent—Ure—Clyde. Agent—Alexander Morison, S.S.C.

COURT OF SESSION.

Thursday, March 12.

FIRST DIVISION.

GOVERNORS OF ANDERSON'S TRUST, PETITIONERS.

Trust—Charity—Administration—Nobile Officium—Relief of Rates.

The Court in the exercise of its *nobile officium* will not sanction the application of the money of a charitable trust to educational or charitable purposes for which it is lawful to impose rates, or to the accomplishment of which public moneys are already dedicated.

The governing body of a charitable trust, which provided free elementary education for poor children in certain parishes, presented an application to the Court for alteration of the scheme of administration of the trust drawn up by the Educational Endowment Commissioners. The reporter to whom the Court remitted to consider the alteration, objected to it on the ground that the application of the funds proposed was truly in relief of rates. The petitioners thereafter amended their proposed alteration so as to confine the application of the funds exclusively to an object for which rates could not be imposed.

The Court *granted* the application as amended.

The Governors of Jonathan Anderson's Trust, Forres, with consent of the Scotch Education Department, presented a petition for alteration of the scheme of administration of the said trust prepared by the Commissioners under the Educational Edowment (Scotland) Act 1882, and acted upon since 1888.

The petitioners averred—"Under said scheme the petitioners have maintained a school in the buildings of the Institution. The Institution stands opposite the Public School of the burgh of Forres, and playgrounds of the Institution and the Public School are separated only by High Street, so that they might be very conveniently conducted under the superintendence of one headmaster. The children attending the two schools belong to the same classes

of the community. The subjects taught and the range of instruction provided for in both schools are practically the same. The abolition of fees has materially altered the situation as regards these two schools, and the reason formerly prevailing for the establishment and separate maintenance of a school in connection with the Institution as a free school is no longer valid. The two schools have no distinctive character to warrant their continued separation, each having classes for every standard of the code and for practically the same specific subjects, and a full staff of teachers; and at the present time there is much overlapping in the work of the two schools, and serious waste of teaching power, and also unnecessary expenditure. The proposed alterations are unanimously approved of by the Governors of the Institution and by the School Boards of Forres (burgh and landward), Rafford, and Kinloss. It is now proposed, with the consent of the Scotch Education Department and the said School Boards, to make over the school connected with the Institution, with the use of the buildings and pertinents, and a portion of the revenue of the endowments which has hitherto been expended by the petitioners in maintaining the school, to the said School Board of the burgh of Forres for the purpose of the establishment and maintenance by the Board of an improved secondary department in connection with the Forres Public School. The petitioners believe that the usefulness of the endowments will be extended by their being applied towards the maintenance of such a department. It is necessary for the carrying out of said proposal that the provisions of the scheme of the trust should be altered. The petitioners have drawn up and adjusted with the Scotch Education Department a schedule, which is annexed hereto, containing the necessary alterations, which are not contrary to anything contained in the Educational Endowments (Scotland) Act 1882."

They therefore craved the Court to alter the scheme in terms of the annexed schedule.

In the said schedule the following alteration, *inter alia*, was proposed—"IV. Section 27 of the scheme shall be cancelled and the following section shall be substituted therefor:—'The Governors shall make over the use of the buildings of Jonathan Anderson's Institution, the playgrounds, teacher's house, outbuildings, and garden, to the School Board of the burgh of Forres for educational purposes, and shall also pay over annually to the said Board that portion of the revenues of the trust which by section 27 of the said scheme, hereby cancelled, is available for the salaries of teachers, and the said School Board shall administer the same for that purpose with a special view to the establishment and maintenance of an efficient secondary department in connection with the Forres Public School.'"

On 25th November 1895, Mr Fleming, advocate, to whom the Court remitted to consider the proposed alteration and to report, reported generally in favour of the alteration of the scheme, which, he thought, "would result in a much more beneficial employment of the trust funds than is possible at present, and is desirable." The reporter continued—"But I think that the method in which the petitioners propose to make this change is open to criticism. They propose that they should hand over to the Forres School Board their school with the use of their school buildings, and pay annually to them as much of the revenue of their endowments as has hitherto been expended in maintaining the school. In return for this the School Board is to give free education to poor children selected by the petitioners, and is to relieve the petitioners of all their powers, duties, and responsibilities as managers of the said school. This obligation on the School Board to give free education to poor children is merely nominal, as education is given free to all children in Forres, and it is difficult to see how it could be enforced, for the annual transfer of income to the School Board is not made conditional upon their obligation being duly fulfilled. A further consideration arises from the doubt whether such an application of these funds would not be truly in relief of rates. The School Board has already in operation a secondary department, and to allow charitable funds to be applied as proposed, to render this department more effective, seems to be a violation of the principle laid down in the Prestonpans case—*Kirk Session* v. *School Board of Prestonpans*, November 28, 1891, 19 R. 193. I would submit that it is inadvisable to divest the petitioners of their duties to such an extent and under such an arrangement."

At the bar the petitioners amended the article of the schedule quoted above by making it run as follows:—"And the said School Board shall administer the same solely for the establishment and maintenance of an efficient Secondary Department in connection with the Forres Public School."

Argued by the petitioners—The *Prestonpans* case was different from the present one, for here the proposal was to apply the funds to secondary education, which the ratepayers were not bound to supply. This was made plain by the amendment of the schedule which completely met the reporter's objections.

At advising—

LORD PRESIDENT—We have a carefu land useful report from Mr Fleming, and he has very properly called our attention to what at first sight seems a formidable objection to the proposed scheme. The petitioners, however, have now made an important amendment of the proposed scheme, in view of which I think that we may safely grant the prayer. By that amendment it is now made clear that the trust funds are to be administered "solely for the establishment and maintenance of an efficient secondary department in connection with the Forres Public School."

This being so, the moneys of this trust will, under the proposed scheme, in no way go in relief of the ratepayer. It is true that this "School Board has already in operation a secondary department." But the School Board, while it may quite well have such a department in operation, is not, in a fair exercise of its statutory powers, entitled to impose rates for its establishment or its maintenance; nor could it legitimately so administer the establishment, of which the secondary department forms part, as to make a deficit caused by the secondary department fall upon the ratepayers. Accordingly, I think that the amendment of the scheme enables it to escape the just criticism of the reporter.

I may add that the principle to which the reporter refers was only incidentally illustrated in the *Prestonpans* case, but it is of unquestionable soundness. If some educational or charitable purpose be one for which it is lawful to impose rates, or to the accomplishment of which public moneys are already dedicated, then it is plain that to give the money of a charitable trust to that purpose is not to further the purpose which is already provided for, but to relieve the ratepayer or the taxpayer, as the case may be, who is by statute made the debtor in an obligation. The Court, if it were to make such an application of trust money, would, under the guise of promoting a purpose which once depended on charity, be ignoring the facts that by legislation that purpose had passed out of the region of charity into that of obligation on the ratepayers, and that a charity devoted to the recipients of education is misapplied if devoted to the givers of education, whether voluntary or compulsory.

LORD ADAM and LORD KINNEAR concurred.

LORD M'LAREN was absent.

The Court granted the application as amended, with expenses out of the funds of the trust.

Counsel for the Petitioners—Jameson—Craigie. Agent—Robert Stewart, S.S.C.

Thursday, March 5.

FIRST DIVISION.

[Lord Stormonth Darling, Ordinary.

MARQUIS OF HUNTLY AND OTHERS *v.* NICOL.

Res judicata—Regulation of Exercise of Heritable Right—Servitude—Privilegium aucupandi—Admissibility of Opinions to Control Effect of Decree.

The proprietor of the lands of B was infeft "cum privilegio et libertate aucupandi," in the forest of Birse, the property of which was in the proprietor of the lands of A, which were totally independent of the lands of B.

In 1819 the House of Lords affirmed a decision of the Court of Session to the effect that the right of the proprietor of B over the forest of Birse was a heritable right, and that the same might be exercised by the proprietor of B personally, by his gamekeeper, and by any friend to whom he might give permission, whether his tenants on B or not.

The opinions of some of the individual Judges in the Court of Session were inconsistent with the decree pronounced as aforesaid.

In 1858, in an action raised by the proprietor of A to limit the right of the proprietor of B over the forest, the Court of Session found that the question was *res judicata* in respect of the previous decision.

An action having been raised in 1895 by the proprietor of A against the proprietor of B, to have it declared that the right of the latter over the forest was limited in certain respects, and in particular that he might not let the shooting over the forest, or kill game there for the purpose of selling it—*held* (*aff.* judgment of Lord Stormonth Darling, Ordinary) that in terms of the interlocutor affirmed in 1819, the proprietor of B was entitled (1) to let the shooting over the forest, (2) to sell the game shot there, the proprietor of A having no interest in the question of its disposal, and generally that absolvitor must be pronounced in respect that the action was not one for regulating the exercise of the heritable right belonging to the proprietor of B, but for raising anew a question already decided.

Question (*per* Lord M'Laren) whether in a question of *res judicata* even the collective opinion of the Court may be referred to for the purpose of controlling or limiting the effect of its decree.

By instrument of sasine dated 1721, Alexander Ross, of Tilliesnaught, now called Ballogie, was infeft in the said lands of Tilliesnaught "cum privilegio et libertate aucupandi et piscandi ac cum communi pastura in forrestis de Bris Glencat Glencaven et Lendrum . . . nec non cum speciali libertate et privilegio scindendi ligna in forresta de Bris conservandi et ædificandi toflas [keeping and bigging sheilds] in eadem forresta ac in forresta de Lendrum pro proprio usu dict Alexandri Ross ejusq prædict et eorum tenen dict terrarum modo solit et consuet per dict Alexandrum Ross ejusq authores et prædecessores."

Certain questions having arisen between the proprietor of the lands of Aboyne, who had a grant of the royal forests of Birse and Glencat, of which he was forester, and the proprietor of Ballogie, with regard to their respective rights over the said forest of Birse, the dispute was referred to arbitration in 1755, and an award was pronounced to the effect that the right of property of the forest belonged to the Earl of Aboyne. The rights of common pasturage