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

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

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

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

LORD MONCREIFF was absent.

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

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

The Court pronounced this interlocutor—

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

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

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

Friday, February 23.

SECOND DIVISION.

[Sheriff Court at Stonehaven.

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

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

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

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

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

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

so far as within the area of the salmon fishings in North Esk belonging to him and the pursuers, the trustees of the said late Barron Grahame, Esquire of Morphie."

The defenders maintained that the St Cyrus District Committee as road authority were entitled under the Roads and Bridges (Scotland) Act 1878, section 123, and the Act 1 and 2 Will. IV. cap. 43, section 80, to take stones for the purpose of repairing roads from the place in question upon the ground (1) that it was open uncultivated land or waste, and (2) that whether it was open uncultivated or waste land, or enclosed land, the stones were not required for the private use of the pursuers.

The Act 1 and 2 Will. IV. cap. 43, section 80 (referred to in the Roads and Bridges (Scotland) Act 1878 (41 and 42 Vict. cap. 51), section 123, and contained in Schedule C to that Act annexed), enacts as follows:—"It shall be lawful for the trustees of any turnpike road, or any persons authorised by them, to search for, dig, and carry away materials for making or repairing such road and the footpaths thereof, or building, making, or repairing any toll-house, bridge, or any other work connected with such road, from any common land, open uncultivated land or waste, or to deposit mud or rubbish thereon, without paying any surface damages or anything for such materials except for stone to be used for building, and to carry the same through the ground of any person, such trustees or other persons authorised by them filling up the pits or quarries, levelling the ground wherefrom such materials shall be taken, or fencing off such pits or quarries so that the same shall not be dangerous to any person or cattle, and paying for or tendering the damage done by going through and over any enclosed or arable lands for or with such materials used or rubbish, such damages to be ascertained as hereinafter mentioned; and also it shall be lawful for such trustees and other persons authorised by them as aforesaid to search for, dig, and carry away such materials in or out of the enclosed land of any person where the same may be found, and to land or carry the same through or over the ground of any person (such materials not being required for the private use of the owner or occupier of such land, and such land or ground not being an orchard, garden, lawn, policy, nursery for trees, planted walk or avenue to any house, nor enclosed ground planted as an ornament or shelter to a house, unless where materials have been previously in use to be taken by the said trustees), making or tendering such satisfaction for stones to be used for building, and for the surface damage done to the lands from whence such materials shall be dug and carried away, or over or on which the same shall be carried or landed, as such trustees shall judge reasonable."

A proof was allowed. It appeared that the place from which the District Committee claimed right to take stones was a shingle bank lying upon the northern side of the river North Esk. At this point the river curved to the south, and the shingle bank lay upon the bend of the curve. It was considerably above the level of the water in the river except at times of exceptional flood. At one time the river at this point had divided and flowed in two channels enclosing an island chiefly composed of shingle, but containing a small piece of pasture land, which still remained, and was bounded partly by the present channel of the river and partly by the shingle bank. The more northerly of these two channels had now become filled up. Part of the shingle bank lay upon what had formerly been part of the more northerly channel.

To the north of the shingle bank, and not separated from it by any fence, there was a strip of pasture land, which was bounded partly by the river, partly by the shingle bank, and partly by a flood embankment and fence. This fence ran down to the bank of the river at both ends, the upper end being some distance above and the lower some distance below the shingle bank.

Over this pasture land there was a cart track, not fenced, and marked only by ruts by which the defenders had obtained access to the shingle bank. This track ran from a road which led into the public road to Bervie.

The Court ultimately held it proved that the pursuers and their fishing tenants required all the stones upon the shingle bank for their own use.

On 22nd September 1899 the Sheriff-Substitute (BURNET) issued the following interlocutor:—"Finds that the bed, channels, and banks of the river North Esk *ex adverso* of the lands of Morphie and Stone of Morphie, belonging to the said Francis Barclay Grahame, and so far as within the area of the salmon-fishings belonging to him and the trustees of the said late Barron Grahame of Morphie, are enclosed lands within the meaning of section 80 of 1 and 2 Will. IV. cap. 43, and that the defenders are not entitled to remove therefrom any boulders, stones, gravel, or other material, except such material as is not required for the private use of the said Francis Barclay Grahame and the said trustees as proprietors thereof aforesaid: Finds that the whole boulders, stones, gravel, and other material now lying in the said bed and channels and upon the said banks are required for the private use of the said proprietors, and that the defenders are not entitled to remove the same: Therefore declares the interim interdict already granted to be perpetual, and decerns: Finds the pursuers entitled to expenses," &c.

Note.—"The object of this action is to have the defenders interdicted from taking boulders and other material from the bed, channels, and banks of the river North Esk *ex adverso* of the lands belonging to the pursuers. The right to take such material is rested upon the provisions of the Act 1 and 2 Will. IV. cap. 43, sec. 80, and there is little or no dispute about the law of the case, for it has been solemnly decided in regard to this very river that the expression 'lands' in the statute means and includes beds of rivers—*Lyell's Trustees* v.

Forfarshire Road Trustees, 1882, 9 R. 793. That decision is said by Professor Rankine in his note upon the section (Land-Ownership, 2nd edition, App. p. 801, note) to deserve reconsideration, but it has not yet received it, and I must therefore hold that the subjects sought to be protected by interdict here, which are banks of shingle and boulders thrown up by the stream, are 'lands' to which the provisions of the section are applicable.

"The section describes the land from which material may be taken by road trustees for road purposes as of two kinds—(*first*), 'any common land, open uncultivated land or waste;' and (*second*), 'the enclosed land of any person.' From the former, the trustees for the public roads are authorised to take material (except building stone) for nothing, being bound only to level and fence the ground from which it has been removed, and to pay the surface damage caused by the removal. In regard to the latter, their rights and liabilities are similar, except that no material may be so taken by them which is required for the private use of the owner or occupier of the land.

"It does not appear from the report of *Lyell's* case that the Court expressly decided under which of these categories the bed of the river there in question was held to fall. But by the interlocutor there pronounced the rights of the owner were carefully protected, and it may be inferred, therefore, that the river bed was there regarded as falling within the description of 'enclosed land'; and I think the banks of shingle and boulders must be so treated in the present case. At all events, they are plainly not 'common land,' nor can they be described as 'uncultivated' or 'waste' land, seeing that from their nature both the cultivation and use of them otherwise are out of the question.

"The pursuers accordingly attempted to make out that all the boulders and such material as the defenders have hitherto been in the habit of taking from the bed, channel, and banks of the river are in point of fact necessary for the proper upkeep of the banks and the maintenance of the fishing stations, and that they are therefore excepted from the defenders' statutory right of removal as being required for the owner's private use. I think the pursuers have successfully shown this. They have proved, in my opinion, that the maintenance of the banks of this river is of the greatest importance to the preservation of the fishing station upon it, and is, moreover, a matter of great difficulty, requiring constant labour and attention. They have proved that the boulders sought to be abstracted by the defenders form the natural and most suitable material for maintaining the banks, and that, in the opinion of fishermen and others most competent to judge, the supply of these boulders is barely sufficient for that purpose. It may be that at times a surplus of boulders may be found over and above the quantity actually required for the banks at the moment, and which might therefore fall under the description of material which road trustees may lawfully abstract. But it is impossible to foresee these accumulations, and equally so to foretell what increased demands upon them the sudden changes in its course and volume (to which this river is proved to be peculiarly subject) might at any moment occasion. I do not therefore see my way to deal with this case by regulating, by means of remit to a man of skill, as was done in *Lyell's* case, the operations of the defenders. I think these operations cannot, for the present at least, proceed without detriment to the landowners; and the proof led does not suggest any system of supervision by which the exercise by the defenders of their statutory privileges could be so regulated as to be for the future rendered *innocuæ utilitatis*. It seems to me that, applying the principles of interpretation of the section explained in *Yeats* v. *Taylor*, 1863, 1 Macph. 221, in the circumstances proved in this case, the whole supply of boulders and such material is no more than is required at present, and may reasonably be expected to be required in future, for the private use of the proprietors for the proper maintenance of the banks and fishing stations of the river owned by them."

The defenders appealed to the Court of Session, and argued—This shingle bank was "land" within the meaning of the Turnpike Act (1 and 2 Will. IV. c. 43), section 80—*Lyell's Trustees* v. *Forfarshire Road Trustees*, May 18, 1882, 9 R. 792, Indeed this case was *a fortiori* of *Lyell*, because here it was not proposed to take stones from the river bed but only from the bank. That case was rightly decided. The "land" here was not "enclosed land," and it did not therefore signify whether the pursuers required the stones for their own use or not. But even if the "land" was "enclosed land," the defenders were entitled to take the stones because they could do so without prejudice to the pursuers' legitimate requirements. It was not proved that the pursuers would either immediately or within any reasonable time require all the stones for their own use. In any view, the defenders should be allowed to take stones from the bank subject to regulation by the Court, as was done in *Lyell*, *cit*.

Argued for the pursuers—If the case of *Lyell* decided that the beds and banks of rivers were "lands" within the meaning of the Turnpike Act, it was wrongly decided, and one decision did not make the law. The beds and banks of rivers were not intended to be included under "lands" in the Act. Apart from that, however, this place, if "land," was "enclosed land" in fact and in law. The case of *Lyell*, *cit.*, was itself an authority for that proposition. Here all the stones were required for the proprietors' own purposes, and the pursuers were therefore entitled to interdict as craved.

LORD JUSTICE-CLERK—Had it not been for the case of *Lyell's Trustees*, which was decided in this Court, I think that an im-

portant question, and the first question in this case, would have been, whether or not this shingle bank, forming as it does in my opinion part of the bed of a river, is included in the word "lands" in the statute; and all I say on that matter is this, that if any case arises under this statute which depends solely on the consideration of that question, I should very much wish that the matter should be considered by a full Bench. But I shall take it that the law is as stated in that case, namely, that this ground must be considered to be "lands" in the sense of that statute. It has been argued to us that that land is waste land—uncultivated land in terms of the statute—and is not enclosed land, and that therefore is the first question to consider in disposing of the case, for it depends on which view is taken on that matter whether certain questions are to be answered in a particular way or in the opposite way. Now, I am quite satisfied that this is not waste unenclosed land. I think it is enclosed land. I think there is nothing more common in this country than that land should be enclosed in the neighbourhood of a river by a fence which meets the river at both its ends, and by the river itself. It cannot be said that a river is not a fence because people can wade through it, or because it can be passed by artificial means, such as a boat. That applies to all fences—you can pass them if you use extraordinary means to do so. But the natural or proper fence of a piece of ground next a river is the river itself, and this piece of ground could not be approached except by crossing the river or by passing through the fence which joined the river at both its ends. It would be very difficult indeed to imagine any better enclosure of land than that; and that it was enclosed for practical purposes connected with fishing, and protecting, on the one hand, arable land which was further from the river, and on the other hand pastoral land on the river, from any intrusion, I cannot think to be doubtful. And in these circumstances it is land on which, according to the statute, the road trustees are not entitled to come and take material, unless it is material which is not required by the proprietor for his reasonable use in connection with the estate. Now, that in this particular case the material is used, and regularly used, as required from time to time for purposes connected with the salmon fishery carried on from the bank of this river, I think there can be no doubt. I think the proof plainly discloses that material was so used, and regularly so used, when it was required. If you have a salmon fishery in a stream of this kind, which plainly from the nature of the ground forming its bed in this place is a stream somewhat erratic in its course, and somewhat violent in its proceedings, the stone which is found on such a shingly bank as we find here will be required for the use of the proprietor from time to time. It may be that in this case at the present moment it is not required. In the ordinary course of conducting the estate it might be a loss to the proprietor if the stones are taken away which he requires for his use. But further than that, I am satisfied also that the taking away of these stones may seriously interfere with the use of his property there, apart altogether from the question whether he requires to construct works with these stones, because, while it might be said that the taking away of stones at the present time has not had any effect, still necessarily stones cannot be taken away from this shingle bank without to some degree lowering the level of the bank, and if stones continue to be taken away the lowering of the bank will also be continued, and that may have an important effect on the course of the stream. The day may come, if such work is carried on for a very considerable time, when the effect of what has been done will be that the course of the stream will be seriously altered.

Now, taking all these grounds together I think the decision at which the Sheriff-Substitute arrived is right—that this is a piece of enclosed land, and that the road trustees, or the District Committee as the body now in place of the road trustees, are not entitled to come on that land and take stones, it being in my opinion sufficiently shown, though in some respects the proof is a little thin on the matter, that such stone as they have been in the habit of taking away is required for the use of the proprietor of the estate. It is not necessary to enlarge on the matter as the case depends purely on fact. I think that the proper course is to give interdict in terms of the first conclusion. The Sheriff-Substitute, probably through inadvertence, granted the general interdict in terms of the interim interdict which was merely for the time being, and not suitable for perpetual interdict. I think the first conclusion for interdict is right, and that we ought to grant interdict accrodingly.

LORD TRAYNER—The first question to be considered here is whether the gravel bed in question falls within the description of "lands" as mentioned in the 80th section of the General Turnpike Act of 1831, because if it does not the appellants have no right to go for boulders or any other material there. As your Lordship has observed, the case of *Lyell's Trustees* v. *The Forfarshire Road Trustees*, decided by this Division of the Court in 1882, is an authority for the proposition that the bed of a river falls within the statutory definition of "lands." That case must at present be regarded as an authority, although individually I am not prepared to concur in it.

But taking that case, as your Lordship does, as deciding that the bed of a river comes within the description of lands as given in the General Turnpike Act, the question that follows is, Is it unenclosed or enclosed land? On that question I agree with what your Lordship has said; I think there can be no room for doubt on the evidence before us that this is enclosed land.

With regard to the second point, whether or not the materials which the appellants

propose to take from this enclosed land are required by the owners of the property, I must confess that the proof is not just so full or so explicit as one would have desired; but there is proof to a certain extent to support the Sheriff-Substitute's finding, and I have heard nothing to induce me to differ from the finding of the Sheriff-Substitute on that point.

I am therefore of opinion with your Lordship that the interlocutor ought to be in substance affirmed, but recalled in point of form in order to give decree of interdict in terms of the first conclusion.

LORD PEARSON — This case as argued for the respondents raises a question of very wide importance, on the construction of section 80 of the General Turnpike Act. But I agree with your Lordships that the respondents are entitled to succeed upon the facts, even on the assumption that that question of law was well decided in the case of *Lyell's Trustees*.

I need not advert to the proof, as your Lordship has already pointed out how it supports, as I think it does, the case for the pursuers. The only difficulty I have felt is this. The first finding, if we affirm the Sheriff-Substitute's interlocutor, is that these lands are enclosed lands within the meaning of section 80. To a certain extent therefore we are affirming the view which was taken in the case of *Lyell's Trustees* as to the meaning of the word "land" in section 80; and I only desire to add that I concur in that finding in deference to the authority of that case, and that so far as my opinion goes I am anxious that nothing we do should be regarded as adding to the weight of that decision. But assuming the law to be as there laid down, I think the pursuers are clearly right on the facts, and that we need not consider whether they could succeed on the other ground. Therefore I concur with what your Lordships propose.

LORD YOUNG and LORD MONCREIFF were absent.

The Court pronounced this interlocutor:—

"Recal the interlocutor appealed against: Find in fact (1) that the bed, channels, and banks of the river North Esk *ex adverso* of the lands of Morphie and Stone of Morphie, belonging to Francis Barclay Grahame, and so far as within the area of the salmon fishings belonging to him and the trustees of the late Barron Grahame of Morphie, are enclosed lands within the meaning of section 80 of 1 and 2 Will. IV. cap. 43; (2) that the defenders are not entitled to remove therefrom any boulders, stones, gravel, or other material, except such material as is not required for the private use of the said Francis Barclay Grahame and the said trustees as proprietors thereof foresaid; and (3) that the whole boulders, stones, gravel, and other material now lying in the said bed and channels and upon the said banks are required for the private use of the said proprietors: Find in law that the defenders are not entitled to remove the same: Therefore interdict and prohibit the defenders, and each of them, and all others acting for them or under their instructions, from lifting, removing, and taking or carting away boulders, stones, gravel, or other material from the bed, channels, and banks of the River North Esk *ex adverso* of the lands of Morphie and Stone of Morphie, belonging to the said Francis Barclay Grahame, and so far as within the area of the salmon-fishings in North Esk belonging to him and to the pursuers, and decern: Find the pursuers entitled to expenses in this and the Inferior Court," &c.

Counsel for the Pursuers — Solicitor-General (Dickson, Q.C.)—Fleming. Agents —Morton, Smart, & Macdonald, W.S.

Counsel for the Defenders—Campbell, Q.C. — Dove Wilson. Agents — St Clair Swanson & Manson, W.S.

Friday, February 23.

FIRST DIVISION.

[Lord Low, Ordinary.

WALLACE *v.* WHITELAW.

Process — Partnership — Petition for Dissolution—Distribution of Business Act 1857 (20 *and* 21 *Vict. cap.* 56), *sec.* 4—*Partnership Act* 1890 (53 *and* 54 *Vict. c.* 39), *sec.* 35.

Section 4 of the Distribution of Business Act 1857 provides that "all summary petitions and applications to the Lords of Council and Session which are not incident to actions or causes actually depending at the time of presenting the same, shall be brought before the Junior Lord Ordinary officiating in the Outer House," and particularly the petitions and applications therein mentioned, including those for the appointment of a judicial factor.

Section 35 of the Partnership Act 1890 provides that "on application by a partner the Court may decree a dissolution of the partnership in any of the following cases," &c.

Held that a petition for dissolution of partnership and appointment of a judicial factor, presented under section 35 of the Partnership Act 1890, cannot be competently presented to any other than the Junior Lord Ordinary.

Observed, that in cases under that section which involve inquiry into disputed matters of fact, an action of declarator is the appropriate form of application.

Process—Reclaiming-Note—Competency of where Want of Jurisdiction is Pleaded.

A petition for dissolution of partnership and appointment of a judicial factor was presented under section 35