

when the access is made, and after that the second and further obligation of maintenance passes to those who may be owners at the time. But in the present circumstances I am by no means prepared to assolzie the Improvement Trustees, because the access never has been made at all, and further there are two peculiarities in their dealings with their feuars, *firstly* that they bound or sought to bind them not to look at their title, and *secondly*, that they took the feuars bound only to leave 9 feet in width of access, a space which this Court agrees with the Lord Ordinary in thinking insufficient.

It seems to me that the Trustees are bound to construct an access 12 feet wide, but that then their part of the obligation will have been implemented, and it will be the feuars' obligation to maintain the access. It is this part of the interlocutor of the Lord Ordinary with which I do not agree. Let the Improvement Trustees be ordained to make the access; as to the finding that in regard to upholding and maintaining it, I do not think it a necessary or advisable one in such an action as this.

LOED JUSTICE-CLERK—I concur substantially in the opinions delivered by your Lordships. This difficulty has been caused entirely by the action of the Improvement Trustees, and much trouble and annoyance might have been saved had they consulted at the outset those who had a right to this access. Moreover, they introduced into their articles of roup a provision to prevent inquiry into title by the purchasers, and they announced so many feet of frontage as for sale, when in point of fact they had not as many to sell.

I would only wish further to guard against one or two conclusions which might erroneously be deduced from this judgment. I do not say that the whole obligations did not pass with the land, or that distinctions may not exist between construction of the access and its maintenance; but these are points which we are not called upon to decide, and do not decide. The question of maintenance both between the feuars and the superior owners, and between the feuars and the Improvement Trustees, must be entirely reserved.

The Court pronounced the following interlocutor:—

“The Lords having heard counsel on the reclaiming note for the defenders, the Edinburgh Improvement Trustees, against Lord Curriehill’s interlocutor of 4th March 1876, Adhere to the said interlocutor so far as it is directed against the defenders the Improvement Trustees: Find, further, that the defenders John Mackellar and Thomas Brady are in virtue of their feu-rights bound to submit to a servitude of a cart and carriage access from the Grassmarket to the property of the pursuers over so much of the ground included in their respective rights, which abuts on the existing access, as was acquired by their authors the Improvement Trustees from Sir George Kinloch by the disposition No. 8 of process, and that of the dimensions set out in the said interlocutor: But before further answer on the remaining points of the case, including any question relative to

the future maintenance of the entrance in question, appoint the defenders the Improvement Trustees to state in a minute what steps they are prepared to take in order to carry out this judgment: Find the defenders the Improvement Trustees liable in additional expenses, and remit to the Auditor to tax the same and to report: Reserve in the meantime all other questions of expenses.”

Counsel for Improvement Trustees—M'Laren—Mackay—Harper. Agent—J. Knox Crawford, S.S.C.

Counsel for Brady—Guthrie Smith. Agent—J. Duncan Smith, S.S.C.

Counsel for Mackellar—M'Kechnie. Agent—Thos. Spalding, W.S.

Counsel for Cooper & M'Leod (Pursuers) Campbell Smith—J. P. B. Robertson. Agents—Keegan & Welsh, S.S.C.

Tuesday, July 18.

FIRST DIVISION.

[Lord Young, Ordinary.

THE UNIVERSITY OF ABERDEEN v. THE TOWN COUNCIL OF ABERDEEN.

Trustee—Property—Sale—Prescription.

A sale of lands by a corporation in their character of trustees for certain mortifications to themselves in their separate character of a burgh or community, is not protected by either the position or negative prescription.

Trust—Breach of Trust—Beneficiary—Salmon Fishings.

In 1797 a corporation, acting as trustee for certain mortifications, sold certain lands to themselves for their own behoof. The said lands were acquired by the corporation for the purpose of enabling them to apply to the Commissioners of the Treasury for a grant of salmon fishings *ex adverso* of the said lands. Accordingly in 1801 the corporation presented a petition to the Lords of the Treasury, setting forth that they were absolute proprietors of the lands in their own right, and praying for the grant of salmon fishing; which was ultimately given by Crown charter in favour of the corporation. The corporation thereafter possessed the salmon fishing in virtue of the said charter.—*Held* that the corporation, being trustee for the said mortifications, having thus used the trust-estate and the title thereof vested in them for the purpose of obtaining a benefit for themselves, were bound to communicate that benefit to the trust-estate and the parties interested therein, and were bound to hold and administer the salmon fishings as part of the trust-estate, and to apply the revenues and profits thereof to the benefit of the parties interested as beneficiaries in the said mortifications.

Act 1696, cap. 25.

Opinion (per Lord Deas) that the Act 1696,

cap. 25, does not apply to a case where the same parties are truster and trustees.

This was an action at the instance of the University of Aberdeen and the Professors in the Faculty of Arts there, with consent and concurrence of John Cruickshank, LL.D., residing in Aberdeen, sometime Professor of Mathematics in Marischal College, and the Rev. W. A. Pirie, Professor of Divinity and Church History in the said University, for themselves and their interest, pursuers; against the Town Council of Aberdeen, defenders. The summons concluded firstly for declarator "that the following subjects, *videlicet*—All and whole that part of the east division of the lands and barony of Torrie, sometime held by the Master of Mortifications of the burgh of Aberdeen, lying on the south side of the town of Torrie and south pier of the harbour of Aberdeen; as also that slip or piece of moor and pasture ground of the said lands and barony of Torrie, lying along the Girdleness and Bay of Nigg, interjected betwixt the lands of North Kirkhill and South Kirkhill on the west, as distinguished by the marchstones thereof, and the sea on the east, and betwixt the north-east part of North Kirkhill on the south, and the south pier of the harbour of Aberdeen on the north: In like manner, All and whole these several tenements or houses, yards, crofts, and butts of land after mentioned, all lying and situated upon the east end of the village or fish town of Torrie, and adjacent to the west end of Torrie pier; and likewise All and whole the said Master of Mortifications' share, interest, and concern of and in the ferry-boat upon the south side of the river Dee belonging to the said lands and barony of Torrie, with the whole freights, profits, and emoluments thereof, all lying within the said barony of Torrie, parish of Nigg, and county of Kincardine; as also the right of salmon fishing in the sea adjacent to that part of said lands and barony of Torrie, extending from the promontory called Girdleness on the north southwards to a stone marked No. 10 on a plan of the said lands of Torrie and seashore, lodged in our Court of Exchequer in or about the year 1804: And whole rents, profits, and emoluments of said several subjects, ferry-boat, salmon fishing, and others above described, are, to the extent of twenty-one twenty-second parts of twenty-seven one-hundredth parts, and to the further extent of twelve one-hundredth parts, or to such other extent as may be found by our said Lords in the course of the process to follow hereon, held by the defenders as trustees for behoof of the pursuers as beneficiaries under the mortifications of Dr Duncan Liddell, Mr Patrick Coupland, and Mr David Chalmers, made and destined by them for the use of the New College of Aberdeen; and that a pretended transaction or sale, said to have been made or carried out in or about the year 1797, by which James Dick, then Master of Mortifications of the city of Aberdeen, in whom the said parts and portions of the lands and barony of Torrie and others above described, and ferry-boat, had previously been vested in trust, *inter alia*, for behoof of the beneficiaries under the said several mortifications, professed to sell and dispose the same to Gavin Hadden, then treasurer of the burgh of Aberdeen, and his successors in office, treasurers of the said burgh, for the use and behoof of the provost, bailies, council, and community of the said burgh, and

their successors, was and is illegal and null and void, and cannot receive any effect to the prejudice of the just rights of the pursuers." The summons further concluded for declarator that "the defenders are bound to account to the pursuers for the rents, profits and emoluments of the foresaid parts and portions of the lands and barony of Torrie, and ferry-boat and salmon-fishings, all before described, in the same way as if the said pretended sale had never been attempted to be carried into effect; and further, the defenders ought and should be decreed to exhibit and produce a full and particular account of the whole intromissions had by them and their predecessors with the rents, mails and duties, and profits of the foresaid several lands, ferry-boat, and fishings, and others above described, from and since the term of Martinmas 1833, whereby the true balances due by them to the pursuers may appear and be ascertained by our said Lords; and the defenders ought and should be decreed and ordained, by decree foresaid, to make payment to the pursuers of the sum of £10,000 sterling, or of such other sum as shall appear and be ascertained by our said Lords to be due by the defenders as the balance of their and their predecessors' intromissions, with the legal interest thereof from the date of citation to follow hereon until payment; or, in the event of the defenders failing to produce an account as aforesaid, they ought and should be decreed and ordained, by decree foresaid, to make payment to the pursuers of the sum of £10,000 sterling, which shall in that case be held to be the balance of their and their predecessors' intromissions due by them to the pursuers, with the legal interest thereof from the said date of citation until payment."

By deed of mortification executed on 9th December 1613, Duncan Liddell, doctor of medicine, assigned and disposed to the Town Council of New Aberdeen 6000 merks, directing them, *inter alia*, to employ the sum upon land and other sufficient securities, the profit to be employed for the maintenance of a Professor of Mathematics and for other purposes. By three deeds of mortification dated in 1613, 1622, and 1627, Patrick Coupland, preacher in the East India Company, likewise assigned the same body 6000 merks in a similar way for the maintenance of "a learned divine and linguist" in the College. In 1621 1000 merks was also mortified by David Chalmers towards the maintenance of the College. The Town Council received these several sums in trust for the purposes so specified, and in 1704 they invested them, along with the funds of four other mortifications, in purchasing an undivided half of the lands and barony of Torrie, adjoining Aberdeen. The title was taken from Sir William Forbes of Monymusk, in the name of the Master of Mortifications of Aberdeen and his successors in office, for behoof of the beneficiaries under the mortifications. In 1785, after a submission and award, the lands so bought were divided with the proprietor of the other *pro indiviso* half, Mr Menzies of Pitfodels, and the eastern portion was allocated to the Town Council and Master of Mortifications for the above purposes, and it was so managed by him for their behoof. Before 1796 the whole of the lands so allocated had been feued out "with the exception of one lot called the reserved portion, consisting of a strip of

ground adjoining the village of Torrie, and some uncultivated ground extending therefrom eastward and southward along the sea coast to the south side of the Bay of Nigg." The revenue applicable for division thus consisted of these feu-duties and of the rents and profits from the reserved portion.

The pursuers averred, with reference to the latter, "This reserved portion, from its proximity to the town of Aberdeen, was likely greatly to increase in value, and the town council seemed to have formed the design of acquiring it for behoof of the community, to the prejudice of the just rights of the beneficiaries, for whose behoof it had been originally purchased, and for whom it was held in trust by the town council." The scheme which is alleged to have been adopted for carrying this illegal purpose into effect was as follows:—The said reserved portion, which consisted of the said lands of Torrie and ferry-boat described in the libel, was exposed to public sale in name of James Dick, the Master of Mortifications, who was a member of and acted under the instructions of the council. The only offerer at this pretended sale was David Morice, advocate, Aberdeen, who offered the upset price, being an annual rent of £50 sterling for the whole subjects, and was preferred to the purchase. Thereafter, by minute of enactment subjoined to the articles, the said David Morice declared that he had made the purchase under the authority of the town council for behoof of the treasurer of the burgh, and he thereby gave up the same accordingly in favour of Gavin Hadden, Treasurer of Aberdeen, and his successors in office, in name and on behalf of the magistrates, town council, and community." An infestment, it was stated, was thereafter expedite in favour of Hadden for behoof of the town council in these lands, bearing to proceed upon a feu-charter by Dick to Hadden. (The existence of the latter deed was not admitted by the pursuers when the case came before the Inner House, and the action was sisted there to allow the defenders to bring a summons of proving the tenor of it. That having been done, and evidence having been taken, the tenor was held proved.) The charter was in favour of "Gavin Hadden, present treasurer of the burgh of Aberdeen, and his successors in office, treasurers of the said burgh, and their assignees, for the use and behoof of the provost, bailies, council, and community of the said burgh, and their successors." This attempt of the town council to acquire for themselves subjects held in trust was, the pursuers averred, "illegal and *ultra vires*, and the pretended transaction of sale and alleged deed following thereon were and are ineffectual and null and void," and the consideration given was "grossly inadequate and elusory." They challenged the proceeding, they stated, so soon as they became aware of it.

To these statements the defenders answered, *inter alia*, "In 1796 the town council remitted to a committee to visit the reserved grounds, and to report their opinion as to the propriety of feuing out the said grounds, and the manner in which the same might best be done. The committee reported that they were of opinion 'that it would be for the interest and advantage of the funds to which they belong, the same should be sold and disposed of all together by public roup in way of feu.' The reserved ground feu-duties of

the town of Torrie, and interest in Torrie belonging to the Master of Mortifications, were accordingly advertised for sale by way of feu by public roup to take place on 31st January 1797. The upset price was £50 sterling of yearly feu-duty. At that time the annual rental of the subjects exposed amounted, without deduction of burdens, to £44, 7s. 10d. The upset price was the full value of the subjects. Subject to the resolution of the town council to sell the subjects, and the advertisement, some of the council came to be of opinion that the subjects should be purchased for the town, and Mr David Morice was empowered to purchase them at the sale. Mr Morice accordingly purchased them at the sale 'for the account and behoof of the treasurer of the burgh of Aberdeen.'" Further, the transaction was entered into publicly, and in the full knowledge of the beneficiaries in the mortifications.

The minute of meeting of council, dated 27th March 1797, in referring to that transaction, states, *inter alia*,—"The said day the Provost reported that in consequence of the council's remitt, and authority granted to the magistrates the 25th of October last, they had caused expose to public roup on 21st January thereafter the reserved grounds at Torrie. That as it appeared to be the opinion of several of the other members of council as well as the magistrates that the above subjects, on account of their immediate vicinity to the quays and piers already belonging to the town on the south side of the entry of the harbour and the adjacent part of the coast, would be an eligible and convenient purchase for the town and community, the magistrates had empowered David Morice, advocate in Aberdeen, to purchase the same at the roup, which he had accordingly done at the upset yearly feu-duty of £50 sterling. All which having been considered by the council, they unanimously ratify and approve of the purchase, and authorise and empower Gavin Hadden to accept of the same in name and for behoof of the Magistrates, &c., and to grant an obligation to James Dick, Master of Mortifications, and his successors in office, for behoof of the united fund, called the Six Mortifications, for yearly payment of the said feu-duty and performance of the other prestations incumbent on the purchaser by the articles of roup; and upon such obligation being granted, the Council also grant warrant to and empower the said James Dick to grant and subscribe a feu-charter in favour of the said Gavin Hadden and his foresaids of and upon the said lands and other subjects before mentioned, in terms of and under the conditions contained in the articles of roup thereof."

In 1801 the town council presented a petition to the Lords of the Treasury, setting forth that they were infest in the subjects above mentioned; and further, "That a right of salmon is *inter regalia*, and belongs to the Crown, but where no private right has been formerly granted or established it has been the practice of the Crown graciously to grant such a right to the heritors of the adjacent lands, which occasions the trouble of this application to your Lordships." They therefore craved a grant of the salmon fishings opposite the lands in question. The petition was referred to the Barons of Exchequer, who ordered advertisement for several weeks and a report by the King's Remembrancer. Opposition

was made by the proprietors of neighbouring fishings, and in the memorial which the Magistrates presented to the Exchequer in support of their petition it was, *inter alia*, stated—"In the year 1786 the memorialists, for the improvement of the Master of Mortifications' half of the said Torry, and of the funds to which they belonged, sold and disposed thereof, by way of feu, by public roup, in several different lots, for payment of certain annual feu-duties in victual and money; and by the articles of roup a verge of ground of a certain extent of breadth from the sea bank, and skirting along part of the south bank of the river Dee to the harbour mouth, and from thence southward along the coast to the south side of the bay of Nigg, according to a plan made out at the time, was reserved from the roup, principally with a view of enabling the town council to purchase the same when necessary, to extend and increase the improvements of the harbour which they were then, and at present are, carrying on at a very considerable expense, as well as with the express view of obtaining a grant of salmon fishing opposite to those reserved lands." The right asked was granted by the Crown, the Crown charter bearing that the grant was made "propter favorem quem habemus erga prædilectos nostros prepositum, balivos, thesaurarium, concilium et communitatem civitatis de Aberdeen."

The right of salmon fishing had, it was admitted, since the grant become very valuable, and the pursuers averred in this action that it had been granted to the town council merely as proprietors of the lands of Torry, and as annexed to these, and they accordingly laid claim to them.

The pursuers further stated that the management of the mortifications having been entirely in the hands of the town council, they had been in use to receive only what the latter had offered to pay, and they had only recently ascertained that the defenders had for more than forty years back applied to the purposes of the community the whole rents and profits of the subjects beyond the annual feu-duty of £50. That sum had latterly been accepted under reservation of further claims. Maintaining that they were entitled to an accounting with the defenders on the footing that the whole of the rents fell to be accounted for to the beneficiaries, the pursuers stated that the arrears past due amounted to £10,000 or thereby. The Rev. W. R. Pirie, the pursuer, had been Professor of Divinity and Church History since 1843, first in the College, and from 1858 in the University. The pursuer John Cruickshank had been Professor of Mathematics for upwards of forty years prior to the union of the colleges in 1858, and was then superannuated.

The pursuers, *inter alia*, pleaded:—"2. The lands of Torry and others set forth in the summons, having been acquired to the extent foresaid by the funds of the said mortifications, and having been thereafter allocated to the extent foresaid for the purposes of the said mortifications, were thereafter held in trust for the purposes foresaid, and could not be lawfully alienated. 3. The said salmon fishings having been granted by the Crown to the town council as proprietors of the said lands and others, the same accrued to and now belong to the said mortification to the extent of their interest in the

said lands and others. 5. The alleged transaction by which the predecessors of the defenders are said to have acquired said lands and others, and everything which has followed thereon, is null and void, or at least reducible, in respect that the defenders and their predecessors could not lawfully purchase or acquire the subjects which they held in trust for the purposes foresaid. 6. The defenders and their predecessors having received the profits and revenues of the foresaid subjects, the defenders are bound to count and reckon therefor in terms of the conclusions of the libel."

The defenders, *inter alia*, pleaded:—"3. The defenders having possessed the subjects libelled on charters and sasines in their favour for more than forty years, the present action cannot be maintained. 4. The present investments of the mortified funds having been made by the defenders within their powers as trustees, the present action is unfounded. 5. In particular, the sale of the reserved portion of Torry in 1797 was a fair and reasonable change of investment, and cannot now be challenged by the pursuers. 6. The pursuers and their predecessors having been cognisant of the purchase of the subjects libelled, other than the salmon fishings, in 1797, and of the grant of the fishings in 1804, and having annually accepted the free rent of the mortifications and granted receipts therefor to the defenders without objection until 1872, are barred by *mora* and acquiescence from insisting in the present action. 7. The defenders having obtained a Crown grant of the salmon fishings libelled in 1804, after due advertisement, and the pursuers never having objected to the said grant or claimed the rents of the said fishings until 1872, are barred from insisting in the present action as regards the said fishings. 9. The defenders having purchased the subjects libelled, other than the salmon fishings, *bona fide*, and for their full value, in 1797, the pursuers are not now entitled to have the transaction declared illegal and the defenders' titles reduced. 10. The defenders having obtained a Crown grant of salmon fishings in 1804 for behoof of the town of Aberdeen, the pursuers have no right or title to the said fishings or rents thereof."

The Lord Ordinary pronounced the following interlocutor:—

"22d March 1875.—The Lord Ordinary, having considered the record and process, and heard counsel for the parties, Finds and declares that the lands specified in the summons and on the record as purchased by the defenders' predecessors with funds belonging to the mortifications referred to in articles 1 and 2 of the pursuers' condescendence, are held and possessed by the defenders on the subsisting title thereto in name of the treasurer of the burgh of Aberdeen, subject to the trusts of the said mortifications, and that the beneficiaries under the said mortifications are according to their respective rights entitled to the whole free rents and income arising therefrom subsequent to the date of the summons in this action; but finds that the pursuers are not entitled to an accounting with a view to ascertain or recover the amount of any arrears of short or deficient payments which, prior to the action, may have been made to the several beneficiaries under said mortifications, reserving to the beneficiaries themselves, or the representatives of

such of them as may be dead, to sue for any such arrears according to their respective rights; and with respect to the fishings, as distinguished from the lands specified in the summons and record, finds that the pursuers have no right or title thereto, and with respect to them therefore assolizies the defenders from the conclusions of the action and decerns: Finds the pursuers entitled to one-half of the expenses hitherto incurred by them in the process, as the same may be taxed; and remits the account thereof to the Auditor to tax and report: Allows either party to move further in the cause in case a more distinct specification of the lands to which the judgment applies, or any reduction or reformation of the existing title, shall be considered necessary or desirable: Grants leave to either party to reclaim.

“*Opinion.*—The defenders admit the constitution and subsistence in them as trustees of the several trusts created by the deeds of mortification referred to in the first three articles of the condescendence. They dispute, however, that these trusts attach to the lands and fishings specified in the conclusions of the summons, which, according to their contention, were held by them not as trustees under the mortifications but as representing and for behoof of the community of the burgh of Aberdeen.

“Chalmerlaine’s Mortification, referred to in article 3d of the condescendence, may be left out of consideration in this action, for the defenders, while conceding that the funds of the other trusts (and no other funds) were invested by them in the purchase of the lands libelled, allege that the funds of Chalmerlaine’s mortification were and are otherwise invested, and to be accounted for by them accordingly,—and this the pursuers have manifestly no interest to contest.

“It being admitted that the funds of the mortifications referred to in articles 1 and 2 of the condescendence were (without any admixture of other funds) invested by the defenders as trustees in the purchase of the lands libelled, and that they were accordingly, prior to the transactions now challenged, held by them as trustees under these mortifications,—the leading question in the case is, Whether they have ceased to be so held, and in such manner as to liberate them from the trusts which originally attached to them?

“It is unnecessary to refer otherwise than in outline to the facts, which are not disputed. The defenders, as trustees or office-bearers of the burgh in 1796, took the lands in feu from their own hospitable master, *i.e.*, from themselves as trustees under the mortifications, for an annual feu-duty of £50. It was conceded, and is clear that this proceeding could not have been maintained against a challenge at the time, or within forty years. But being fortified by prescriptive possession on an *ex facie* valid feudal title in favour of the treasurer of the burgh, who is the defenders’ officer, as the official trustees of the community, just as the hospitable master is their officer as trustees under the mortifications, it is contended that it is no longer challengeable. I am of opinion that this contention must be rejected, on the ground that a trust originally attaching to property cannot, while it remains in the title and possession of the trustees, be cast off by such a change as was here effected, by the mere action

of the trustees themselves in the title on which they held it. The arguments on the one side and on the other are obvious, and I should not aid the decision of the case by endeavouring to summarise them.

“The result of this opinion is, that since 1796 the rights of the beneficiaries under the mortifications were not satisfied by dividing among them the feu-duty of £50, and that they were entitled to the actual free rents of the lands. But as they only received the feu-duty, thus leaving a considerable arrear of short payments, *i.e.*, of sums to which they were entitled year by year in excess of what they received, the question arises, Whether the pursuers are entitled to recover these? and this is the second question in the case.

“The pursuers contend that short payments to the beneficiaries must be regarded as so much trust-money in the hands of the trustees, and that so regarded they are *in titulo* to sue for the amount. They do not contend that it ought to be added to capital, and I should think such a contention inadmissible. But the only other view is, that the money belongs to those (or the representatives of those) to whom it ought to have been paid year by year. There may or may not be a good answer to their demand, but I am unable to find that the pursuers have any title through them or otherwise to recover the arrears in question.

“The only other question in the case regards the fishings, which the defenders in 1801 acquired by Crown grant for behoof of the community of the burgh. It was not contended that the defenders committed any breach of trust in applying for the grant in favour of the community, or that they were under any obligation of trust-duty to apply for such a grant for behoof of the mortifications. The Crown may have attached importance or not to the representation that the seaboard lands were the beneficial property of the burgh. The fishings were undoubtedly granted to the burgh, and the Crown is not seeking, on the ground of misrepresentation, or on any other ground, to rescind the grant. I cannot transfer them from the burgh to the University, or declare that they are held subject to the trusts of the mortifications founded on.

“The result of the opinion which I have expressed on the several questions referred to is, 1st, That the lands specified in the summons are held and possessed by the defenders subject to the trust of the mortifications referred to in the first and second articles of the condescendence, and that the pursuers are entitled to have this declared, with such further decree or order as shall be found necessary or convenient to reform the existing title to the lands, and ascertain the right of the beneficiaries to the whole free income for the future, subsequent to the date of the action; 2d, That the pursuers are not entitled to an accounting with a view to recover or ascertain the amount of any arrears of short or deficient payments which prior to the action may have been made to the several beneficiaries; and 3d, That, with respect to the fishings libelled, the defenders are entitled to absolvitor.

“The terms of the interlocutor will require attention, particularly in these respects, that the title shall not thereby be unnecessarily complicated; that Chalmerlaine’s mortification (the

funds of which (are otherwise invested) shall be dissociated from the others, and cast out of the action; and that any claim which beneficiaries or their representatives may have to arrears of deficient payments shall not be prejudiced. Perhaps the parties will be good enough to consider the most proper and convenient mode of giving effect to the opinion which I have expressed, and to favour me with their assistance to this end, without of course in any way binding themselves to acquiesce in that opinion or the judgment carrying it out."

Both parties reclaimed.

Authorities—*Baird and Others v. Mags. of Dundee*, Feb. 5, 1862, 24 D. 447, H. of L., 1 Macph. 6; and Feb. 8, 1866, 4 Macph. 392, H. of L. 6 Macph. 29; *Presbytery of Dundee v. Mags. of Dundee*, March 19, 1858, 20 D. 849, H. of L. 4 Macqueen 228; *Irvine v. University of Aberdeen*, Dec. 20, 1870, 9 Macph. 306; *Barns v. Tait and Others*, March 5, 1857, 19 D. 626; *Marshall v. Lyell*, Feb. 18, 1857, 21 D. 514; *Morison v. Gowans*, Nov. 1, 1873, 1 Ret. 116.

During the dependence of the action Dr Cruickshank died, and his representatives were sisted in his place.

At advising—

LORD PRESIDENT—The first conclusion of this summons is a conclusion of declarator that a certain piece of land which forms part of the barony of Torry in the parish of Nigg and county of Kincardine, as also the right of salmon fishing in the sea adjacent to that part of said lands and barony of Torry, which extends from the promontory called Girdleness, on the north, southwards to a stone marked No. 10 on a plan of the lands and sea-shore, lodged in the Court of Exchequer in the year 1804, and the whole rents, profits, and emoluments of the several subjects, are, to the extent of $\frac{3}{4}$ parts of $\frac{1}{100}$ parts, and to the further extent of $\frac{1}{100}$ parts, or to such other extent as may be found by our said Lords in the course of the process to follow hereon, held by the defenders the magistrates of Aberdeen, as trustees for behoof of the pursuers as beneficiaries under the mortifications of Dr Duncan Liddell, Mr Patrick Coupland, and Mr David Chalmerlaine, made and destined by them for the use of the New College of Aberdeen. It may be observed in passing, that the introduction of Chalmerlaine's mortification there turns out to be a mistake, and it may be held not to be embraced in the conclusions of the summons. Then the declaratory provision proceeds—further, that a pretended transaction of sale, said to have been made or carried out about the year 1797, by which the Master of Mortifications of the city, to whom the said portions of the barony of Torry and others above described had been conveyed for behoof of the beneficiaries under the several mortifications, professed to sell and dispose the same to the treasurer of the burgh of Aberdeen and his successors in office, for the use and behoof of the community of the said burgh, was and is illegal, null and void, and cannot receive any effect to the prejudice of the just rights of the pursuers. Then there is a declarator that the defenders are bound to account to the pursuers for the rents upon the principle of that declarator; and there are some other conclusions which it is not necessary to

advert to at present. There is a conclusion, among other things, for reduction of the sale carried through in the year 1797, which may or may not be useful if the pursuers are to succeed in this action, but which, at all events, does not require to be taken into consideration in now disposing of the merits of the dispute between the parties.

The title which the town of Aberdeen acquired to the land in question, apart from the fishings, was a disposition by Sir William Forbes of Monymusk, dated 13th May 1704, by which there were conveyed to the Master of Mortifications of the town of Aberdeen certain pieces of ground therein particularly mentioned, which it is needless to advert to in detail; and it was declared that this conveyance was made to the Master of Mortifications for the use and behoof of the mortifications after specified; and then mention is made of six different mortifications. The only two which are of importance in the present case are the mortifications of Coupland and Liddell, two out of the six. There can be no doubt upon the face of this disposition that the land was acquired for the purpose of an investment of the funds of the six mortifications, according to the amount that each mortification contributed of the purchase-money; and that upon this title the land was held by the Master of Mortifications for the time during nearly a century. The history of the subject after this acquisition of it in 1704 is given in the condescendence, and is not apparently disputed. In the year 1785 a submission was entered into between the town council and Mr Menzies of Pitfodels, the proprietor of the other *pro indiviso* half of the said lands and barony of Torry, under which the same were divided, and the eastern portion of the lands and barony was allocated to the town council and Master of Mortifications, as trustees for behoof of the said several mortifications specified in that deed; and from and after this division the divided half was held and managed by the town for behoof of the several mortifications. In the course of their management of these lands, it is further stated and admitted that the town had, prior to the year 1796, feued out the whole of the lands of Torry allocated to them under the arrangement with Mr Menzies of Pitfodels, with the exception of one lot called the reserved portion, consisting of a strip of ground adjoining the village of Torry and some uncultivated ground extending therefrom eastward and southward along the sea-coast to the south side of the bay of Nigg. The revenue applicable for division among the beneficiaries under the various mortifications thus consisted of the feu-duties from the feued lots, and the rents, profits, and emoluments derived from the reserved portion and the ferry-boat which was attached to them.

This was the state of matters prior to the year 1796. The feus which were given out by the town as proprietors of the subject prior to the year 1796 are not alleged to have been unduly given. They are not challenged upon any ground. In short, they seem to have been acts of legitimate administration. But in the year 1796 there was a proceeding which forms the chief groundwork of this action, and is complained of as an illegal proceeding on the part of the town. The reserved portion of ground, after

the various feus were given out, consisted apparently of a strip of land adjoining the sea-coast, and it is represented as not being of any very great value. But in 1796 the town—that is to say, the town council representing the community—resolved to sell this piece of ground, and they remitted it to the magistrates by a minute of the 25th of October of that year to advertise this piece of ground to be sold by way of feu; and these advertisements having been made, we have the articles and conditions of roup under which the sale took place, which are dated the 21st of January 1797, and which bear to proceed upon an Act of the Council directing this sale to be made. The roup was held, and the articles having been read over in common form, we find from the minutes of exposure and enactment that George More, judge of the roup, “appointed the subjects before described to be entered and set up at the foresaid sum of £50 sterling of yearly feu-duty;” and then “appeared David Morice, advocate in Aberdeen, and offered the upset price of £50 sterling, and bound and obliged himself in terms of the articles of roup,” and he was accordingly declared to be the purchaser. But on the 27th of March 1797, in presence again of the judge of the roup, the said David Morice appeared and declared “that he had purchased the subjects contained in and exposed to roup by the foregoing articles for the account and behoof of the treasurer of the burgh of Aberdeen, in consequence of powers and authority committed to him for that effect by the magistrates of the said burgh, and transferred and gave up the purchase accordingly in favour of Gavin Hadden, present treasurer of Aberdeen, and his successors in office, in name and behalf of the magistrates, town council, and community thereof, and agreed that the charter or disposition of the said subjects should be granted in their favour accordingly by the before-named James Dick, as Master of Mortifications of Aberdeen and heritable proprietor thereof, in terms of the foregoing articles of roup.” And accordingly there was granted by James Dick, Master of Mortifications of the burgh of Aberdeen, a feu-charter in favour of Gavin Hadden, the treasurer of the burgh of Aberdeen, dated the 4th of April 1797. The exposer of the subjects of the roup, and the disponent in this feu-charter, was the Master of Mortifications, in whose person, as has been seen, this subject was vested for behoof of the beneficiaries from the year 1704, when the ground was first acquired by the town, down to the year 1797; and it is under the sale, the proceedings at which I have just described, transferred from the Master of Mortifications to the Treasurer of the burgh of Aberdeen, for behoof of the magistrates, council, and community thereof.

The first question that we have to determine is, Whether that is a valid sale, and if so, what is the effect of it? Now, I do not think that is a question that admits of any doubt at all. The town of Aberdeen, acting through the provost, magistrates, and Council, were trustees for the parties entitled to benefit by these mortifications, and they were not, as such trustees, entitled to purchase the trust-estate. Yet that is the very thing that they did by this sale in 1797. The Master of Mortifications was merely their repre-

sentative in holding the land under the title beginning in 1704, and the treasurer, on the other hand, was merely their hand and instrument in holding the property for their own behoof—I do not say for behoof of the community, because I am speaking of the corporation or community itself in saying that they were trustees. And therefore this is nothing short of a direct sale of the estate by the trustees to themselves for their own behoof, and as such it is plainly an illegal sale; or, in other words, the estate continues to belong to the beneficiaries under the trust just as if no such transaction had ever taken place. We were told indeed that the title which was acquired by the treasurer of the burgh in 1797 had been fortified by prescription, but that admits, I think, of a very short answer. No trustee of such an endowment as this can by any course of time prescribe a right to perpetuate a breach of trust. I hold that to be clear in legal principle and settled on authority, and therefore it is needless to dwell further upon the plea of prescription.

Then, if these lands do truly belong to this trust, just as much as if this transaction had never taken place, the next question comes to be, Whether the fishings which were acquired by a separate title by these trustees also belong to the beneficiaries under the trust? That raises a question of much greater nicety and difficulty. At the time that this illegal sale took place the community of Aberdeen did not as trustees possess those fishings. They were acquired after the illegal sale had taken place, in a manner which needs to be very carefully followed and described, but not until about four years after the sale which is said to be illegal, and which in my opinion is manifestly illegal. But although that length of time elapsed between the illegal sale of the lands and the acquisition of the fishings, I think it is pretty clearly established by some evidence to which I am about to refer that the very object of the illegal sale by the trustees to themselves was to give an opportunity of acquiring these fishings. One thing is quite clear, that without the title to the lands which they acquired by the illegal sale, they would not have obtained these fishings in the way in which they did obtain them. Whether they could have obtained them in any other way is a different matter; but I think it is pretty clear that without the title to the lands which they acquired by the illegal sale they could not have proceeded to acquire the fishings in the manner they did.

In the year 1801 a petition was presented by the council and community of the burgh of Aberdeen to the Commissioners of His Majesty's Treasury. That petition is dated the 16th of May 1801; but it is not immaterial to notice in connection with that a minute of meeting of the Town Council of Aberdeen, which bears date 1st of July, just two months afterwards [quoted *supra*]. Now, the ground referred to in that minute is unquestionably the piece of ground which they had acquired by the illegal sale in 1797. It is clear from it, even apart from what is stated in the petition to the Treasury, that the ground upon which the town council relied in approaching the Crown was, that they were proprietors of this piece of land in the barony of Torry which they had acquired in the manner already described, and in their petition they set

themselves out as being proprietors for the use and behoof of the burgh of this piece of ground; and they say, "That a right of salmon fishing is *inter regalia*, and belongs to the Crown, but where no private right has been formerly granted or established it has been the practice of the Crown graciously to grant such right to the heritors of the adjacent lands, which occasions the trouble of this application to your Lordships;" and accordingly, they pray that His Majesty may be graciously pleased to grant to the treasurer of Aberdeen, for behoof of the petitioners, a right of salmon-fishings in the sea opposite the aforesaid lands, and to remit to the Barons of Exchequer to expedite the charter in the usual manner. A remit is made to the Barons of Exchequer by the Lords of the Treasury, and there is a good deal of discussion before the Barons of Exchequer. The proprietors of the neighbouring fishings were very anxious apparently to prevent this grant from being made, as affecting their interests. It is immaterial to inquire how it affected their interests, but they appear as opponents of this petition and of the grant which was sought for; and there are written memorials for the magistrates in support of their application, and written memorials on the other side against them. The ground taken up by the town is throughout that they are proprietors of the land, and that it is the practice of the Crown to grant to the proprietors of lands on the sea-coast the fishings on the sea-coast *ex adverso*. The opponents of the petition take up generally this ground—that the petitioners' title as landowners is a mere pretence, and an illusory thing altogether; that that bit of ground which they have, and in which the treasurer was infest, is worth nothing, and to represent it as a landed estate to which those sea-fishings should be attached is a mere mockery and a delusion. Now, it is important to observe how it is that the town meet this allegation of the parties on the other side. They say in their memorial—"In the year 1786 the memorialists for the further improvement of the Master of Mortifications' half of the said lands of Torry, and of the funds to which they belonged, sold and disposed thereof by way of feu, by public roup, in several different lots, for payment of certain annual feu-duties in victual and money; and by the articles of roup a verge of ground of a certain extent of breadth from the sea bank, and skirting along part of the south bank of the river Dee to the harbour mouth, and from thence southward along the coast to the south side of the bay of Nigg, according to a plan made out at the time, was reserved from the roup, principally with a view of enabling the town council to purchase the same when necessary, to extend and increase the improvements of the harbour which they were then, and at present are, carrying on at a very considerable expense, as well as with the express view of obtaining a grant of salmon-fishings opposite to those reserved lands." Thus the design of obtaining a grant of salmon fishing opposite to these reserved lands is represented by the town as having been entertained by the magistrates and council so early as the year 1786. And accordingly it was in pursuance of that plan that the lands were acquired by the town for their own behoof, and to the extinction

of the trust by that strange sale from the Master of Mortifications to the Treasurer of Aberdeen. In another place they say, in answer to the case of the parties on the other side—"The memorialists"—that is the town—"paid a consideration for their right"—that is, their right to the lands—"with the express view of obtaining a grant of the sea fishings *ex adverso* of these lands." Here again it is represented that in obtaining the lands under the sale of 1797 they had still the same object in view, viz., the ultimately obtaining a grant to the sea fishings *ex adverso* of these lands. Now, the Crown being advised by the Barons of Exchequer, listened favourably to this proposal, and ultimately granted a charter, which we have before us, and which is written to the seal and registered the 27th of February 1804, by which the salmon fishings in question are given to the Treasurer of the city of Aberdeen and his successors, for the benefit of the provost, bailies, treasurer, council, and community of the said city, and bears to be granted on account of the favour which the Crown had towards the said provost, bailies, treasurer, council, and community of the city of Aberdeen.

Now, it has been contended with great force that whatever may be said of the way in which this right of salmon fishing was obtained, or the representations which were made to the Crown as the reasons for asking this grant, the Crown charter is granted to the town of Aberdeen expressly on account of the favour which the Crown bears to the town, and that it is impossible to get the better of that grant,—to have that grant recalled and another grant made in favour of the town as trustees of this charity. I think there is a great deal of force in that, but it does not appear to me that that is the form of the question that we have to consider. The question that we have to consider is, Whether, although the town of Aberdeen has got a grant out and out in its own favour of these salmon fishings, it is not bound to hold them in trust for the beneficiaries under the mortifications in question? It is not proposed, and does not required to be proposed, that any alteration shall be made in this Crown grant. The only question is, Whether—though being *ex facie* an absolute grant in favour of the town for its own behoof—the town is not under a legal obligation to communicate the benefit of that grant to the beneficiaries under the mortifications? I have felt that to be a question attended with very considerable difficulty, but upon a full consideration of the matter I have come to be of opinion that the beneficiaries under the mortifications are entitled to the benefit of the Crown grant.

It must be observed, to begin with, that the proper trustee under the deed of 1704 was not the Master of Mortifications, who was the party infest, nor the Provost, and Magistrates and Council as individuals, or even as a collective body, but it was the corporation of Aberdeen that was the trustee. In other words, it was the community of Aberdeen that was the trustee. No doubt such a corporation or community, being in the position of a trustee, can manage the trust only through its representative and administrative officers—the magistrates and town council; but still that does not make it a bit the less clear that the true trustee is the corporation it-

self, and not the administrative officers who for the time represent the corporation. The community of Aberdeen therefore being trustee, sold to itself the lands in question, and it has been shown, I think, by very clear evidence that that illegal proceeding was entered upon and carried through with an express view to the acquisition of these salmon-fishings. Without the lands the salmon fishings could not have been acquired, and if the salmon fishings had been acquired before the lands were transferred from the community as representing the trust to the community for its own behoof, then of course the salmon fishings so acquired would have inured to the use and benefit of the trust. It was with an express view therefore to prevent that from taking place that they first of all converted the title from a trust-title into an absolute title for their own behoof, and that was but a step in the proceeding towards the acquiring the salmon fishing. Having then got this absolute title to the lands in themselves, they approach the Crown and state as the ground of their application that they are the proprietors of these lands. We know quite well—it is a matter of notoriety, and does not require to be established in evidence—that the allegation contained in the petition is quite true,—that at that time the Crown was in the habit, where fishings in the sea had not been previously granted, to grant them in favour of the owners of the adjoining land when they applied for them. And accordingly the town of Aberdeen having apparently *ex facie* of its title a good right of proprietorship in the lands adjoining the coast, asked and obtained, according to that practice, the salmon fishings in the sea adjoining that land. Now, it appears to me that without the use of the lands and without the use of the title to these lands the town never could have got the salmon fishings.

Then we come to consider whether there is not applicable to the circumstances of such a case this important legal principle, that a trustee can never use either the property of the trust or the title of that trust to advance his own private interests; and if he does so, and is successful in advancing his own private interest, he must communicate that benefit to the trust-estate. Now, it appears to me that that principle is clearly applicable to the circumstances of the case, as disclosed in the evidence to which I have referred. Without the land they could have got no salmon fishing—by reason of their possession of the property in the lands they did get the salmon fishing—but they were bound to hold that land which they so used for the purpose of procuring the benefit to themselves, for the purposes of the trust, and for no other purpose whatever, and they were not entitled to use it in any way for their own benefit. And yet they did use it for their own benefit, to the effect of obtaining this grant of salmon fishing. It appears to me that it is very difficult, if not impossible, to resist the conclusion that, acting upon that well-known principle in the law of trusts, the town are bound to communicate the benefit of the fishings so obtained to the persons interested in this trust-estate.

There remains only one other question raised by the Lord Ordinary's interlocutor, and that refers to the petitory conclusion of the summons. The petitory conclusion of the summons is ex-

pressed in very general terms—As the result of an accounting for the rents of the lands and of the fishings, to make payment to the pursuers of a random sum of £10,000, and so forth. The Lord Ordinary seems to have been of opinion that the pursuers have no title to sue this petitory conclusion at all, but I think his Lordship is under a certain misapprehension in coming to that conclusion. No doubt the leading pursuer, and in one view the only direct pursuer, is the University of Aberdeen; but then the action is brought with the express consent and concurrence of the two gentlemen who at the time were interested in the mortifications in question, viz., Dr Cruickshank, who was Professor of Mathematics, and so entitled to the proceeds of Dr Liddell's mortification, and Dr Pirie, Professor of Divinity and Church History, who as such was entitled to the proceeds of Coupland's mortification. The action is brought, I say, with their consent and concurrence, and I understand that, in so far as Dr Pirie is concerned, his claim would not extend backwards to so long a period as forty years; and that as regards Dr Cruickshank, although his tenure of office might extend perhaps beyond that period, it is not proposed that the town should be held liable for anything but the revenues and rents of the subjects within the years of prescription. Now, I must say I cannot quite see what difficulty there is in the University of Aberdeen, with the concurrence of the two persons beneficially interested in these trusts, seeking an accounting and payment for the period within the years of prescription; and therefore, without entering into details at present, I shall merely say that when the amount is ascertained I should be prepared to give decree either in favour of the pursuers in the way in which they are set out on the face of the summons, or in favour of the parties who are individually beneficially interested in the revenues for the time. Dr Cruickshank has died since this action came into Court, but his representatives have been sisted in his place, so that all difficulty on that account is very easily avoided.

Upon the whole matter, therefore, I agree with the Lord Ordinary in so far as he holds the sale in 1797 to be illegal, and the parties interested in the trust to be entitled to the full rents of the lands notwithstanding of that pretended sale. But I differ from him in so far as he excludes from the operation of the trust the salmon fishings acquired in the manner which I have described; and I differ from him also in so far as regards his view upon the conclusion for accounting and payment.

LORD DEAS—By deed of mortification dated 9th December 1613, Dr Duncan Liddell assigned and conveyed to the council of New Aberdeen and Mr Thomas Nicholson, so long as he should be in life, 6000 merks Scots, to be employed on land and other sufficient security, and the annual-rent thereof applied, to the extent therein mentioned, in maintaining a Professor of Mathematics in the College of New Aberdeen,—that is to say Marischal College,—and out of the surplus revenue to apply 20 merks annually in maintaining the library he had left to the college, 12 merks for poor scholars at the college and grammar school, and 8 merks to the common poor of New Aberdeen.

By three separate deeds of mortification, executed respectively in 1615, 1622, and 1627, Patrick Coupland, a preacher in the navy of the East India Company, gave, mortified, and destined to "the Provost, Bailies, and Council of the burgh of Aberdeen, and to their successors, provosts, bailies, and council thereof, in all time coming," three sums of 2000 merks Scots each, to be laid out by them on land or annual-rent, "and the yearly annual-rent thereof to be given by them towards the maintenance of a learned divine and linguist, skilful in the Hebrew and Greek tongues," in the college of the burgh—to be chosen by the provost, bailies, and council of the burgh for the time being.

It is proved by documentary evidence, and admitted in the record, that the sums thus mortified by Dr Liddell and Mr Coupland were accepted and received by the provost, magistrates, and town council of Aberdeen, or, in other words, by the corporation of the burgh, in trust for the purposes for which they were thus mortified, and placed under the management of one of their number, chosen annually, called the Hospital Master. In 1704 they invested the amount, along with the funds of four other mortifications under their management, in the purchase of the *pro indiviso* half of the lands and barony of Torry, then belonging to Sir William Forbes of Monymusk. The disposition executed by Sir William acknowledged receipt of the price from Alexander Hepburn, the then Master of Mortifications, out of the funds of the respective mortifications, and disposed the lands to him "and his successors, Masters of Mortification of the said burgh of Aberdeen, heritably and irredeemably," for the use and behoof of the mortifications therein enumerated, including those of Liddell and Coupland now in question. I understand it to be admitted that on this disposition infertment followed in favour of the Master of Mortifications, and that when the lands and barony were afterwards divided in 1785, under a submission between the Master of Mortifications and the proprietor of the other *pro indiviso* half, the title of the Master of Mortifications to the one half was completed in the same terms on which he had held the *pro indiviso* half,—that is to say, expressly as held by him in his official capacity in trust for the purposes of the several mortifications,—the free rents being apportioned amongst them according to a scheme arranged with that view,—the Professor of Divinity receiving the proportion of the income derived from Coupland's mortification, and the Professor of Mathematics his share of the income derived from Liddell's mortification, and the balance thereof being appropriated to the other purposes specified in Coupland's deed.

Prior to 1796 the Master of Mortifications had, by authority of the provost, magistrates, and council, feued out various portions of the eastern half, allotted to them in the division of the lands and barony of Torry, to different parties for payment of certain specified feu-duties. These feu-rights were granted in favour of third parties, and the feu-duties were made applicable and applied to their proper purposes. Consequently these feu-rights were quite within the power of the administrators of the mortifications, and are not sought to be challenged in this action, which relates solely to what came to be called

the reserved portion of the divided half of the lands and barony of Torry, so far as the University, which now comprehends what was formerly the College of Aberdeen, and the Professors of Divinity and Mathematics are interested therein.

But in the year 1797 a transaction of a different description took place. By feu-charter, dated 14th September of that year, James Dick, designing himself Master of Mortifications of the burgh of Aberdeen, in consideration of a feu-duty of £50 a-year agreed to be paid to him in that capacity, and to his successors in office, by Gavin Hadden, treasurer of the burgh, and his successors in the office of treasurer, for behoof of the burgh, sold, alienated, and in feu-farm disposed to and in favour of the said Gavin Hadden and his successors in office, "treasurers of the said burgh, and their assignees, for the use and behoof of the provost, bailies, council, and community of the said burgh, and their successors, heritably and irredeemably, without reversion or regress, All and whole that part of the east division of the said lands and barony of Torrie belonging in property to the said Master of Mortifications, lying on the south side of the town of Torrie and south pier of the harbour of Aberdeen," occupied by the tenants therein named; as also "All and whole that slip or piece of moor and pasture ground of the said lands and barony of Torrie lying along the Girdleness and Bay of Nigg, interjected betwixt the lands of North Kirkhill and South Kirkhill on the west, as distinguished by the march-stones thereof, and the sea on the east, and betwixt the north-east part of North Kirkhill on the south, and the south pier of Aberdeen on the north," as the same was then occupied by the tacksman thereof therein named; and in like manner All and whole these several tenements or houses, yards, crofts, and butts of land therein mentioned, all lying on the east end of the village or fish-town of Torrie, and adjacent to the west end of Torrie pier, viz., the crofts and feu-duties therein enumerated, reserving to the feuars their feu-rights; likewise the said Master of Mortifications, his share, interest, and concern in the ferry-boat on the south side of the river Dee, belonging to the said lands and barony, as then possessed by Alexander Robertson, "all which subjects above specified were excepted and reserved by the said Master of Mortifications when the remainder of his division of the said lands and barony were sold and feued out by public roup upon the 17th of June 1786." Upon the precept of sasine contained in this deed, sasine was given to Gavin Hadden, treasurer of the burgh, for the use and behoof of the provost, bailies, council, and community of the burgh, on 20th April 1797, and the instrument of sasine was duly recorded on the 26th of the same month and year. This feu-charter and sasine, which show upon the face of them how the burgh acquired the subjects, form the only feudal title thereto in favour of the burgh at the present day.

Now, this was a somewhat peculiar transaction in various respects. More particularly—1st, The minutes of council of 20th and 25th October 1796, by which the magistrates were authorised to bring the subjects to a public sale, and to set up the same at such annual feu-duty as they should deem reasonable and adequate, contained no authority to any one to offer for or purchase

the subjects for behoof of the burgh. No written allusion whatever to such an intention was made anywhere prior to the sale.

2d, The most anxious directions were given that the multifarious subjects which were to be sold should be sold in one lot only, the effect of which, of course, was that no competitor who was not prepared to bid for and buy the whole could come into the field at all. Thus the minute of council of 25th October 1791 bears that the committee who had visited and inspected the reserved grounds "were unanimously of opinion that it would be for the interest and advantage of the funds to which they belong that the same should be sold and disposed of all together by public roup in way of feu at such time as the magistrates think proper;" and the magistrates were thereupon authorised "to cause advertise the said reserved lands to be sold by public roup accordingly by way of feu, all together in one lot." The advertisement accordingly intimated that on 21st January 1797 there would be "exposed to public roup and sale by way of feu, all together in one lot, within the Laigh Tolbooth of Aberdeen, sundry parcels of ground lying on the south side of the town of Torry and south pier of Aberdeen," &c. And the articles of roup, after enumerating the various subjects, bore—"The foresaid whole subjects particularly before mentioned are to be exposed and set up to roup all together in one lot at the sum of £50 of yearly rent or feu-duty." This was precisely the opposite of the course adopted on the previous occasion in June 1786, when the lands, other than what are called the reserved lands, were feued out under articles of roup in a great variety of lots to suit purchasers.

2d, The provost of the burgh, George More Esq., was appointed judge of the roup, and the minutes of roup bear that he, as judge foresaid, appointed the subjects before described to be entered and set up at the foresaid sum of £50 sterling of yearly feu-duty, and a sand-glass having been set up" (what sort of sand-glass, whether hourly, half-hourly, or what else is not said), "compeared David Morice, advocate in Aberdeen, and offered the upset price of £50 sterling, and bound himself in terms of the articles of roup; and the said David Morice being the only offerer was declared by the judge of the roup to be the purchaser." All this took place on 21st January 1797, and the minutes to the above effect, with a testing-clause in regular form, were duly signed by the Provost as judge of the roup, and Mr Morice as purchaser, apparently for his own behoof, on that date accordingly.

The prize being thus, as it was supposed, secured, the true nature of the transaction was not disclosed till more than two months thereafter, when Mr Morice and Gavin Hadden, the treasurer, signed a minute, dated 27th March 1797, declaring that Mr Morice had purchased the subjects for Mr Hadden, "the treasurer of the burgh of Aberdeen, in consequence of powers and authority committed to him for that effect by the magistrates of the said burgh; and transferred and gave up the said purchase accordingly in favour of Gavin Hadden, the present treasurer of Aberdeen, and his successors in office, in name and behalf of the magistrates, town council, and community thereof." And Mr Hadden, on the other hand, as treasurer foresaid, for himself, by virtue of his office, and in consequence of an Act of

Council of even date with the minute, "accepted of the said purchase in and upon the terms foresaid." Upon the report of the Provost, avowing that the magistrates had authorised Mr Morice to purchase the subjects for the burgh, an Act of Council was passed of even date with the above minute, ratifying and approving of all that had been done, and authorising the treasurer to accept of the purchase for the magistrates, town council and community, and to grant an obligation to James Dick, Master of Mortification, and his successors in office, for behoof of the united fund called the Six Mortifications, for yearly payment of the feu-duty and performance of the other prestations incumbent on the purchaser by the articles of roup, and empowering Mr Dick to grant a feu-charter in these terms accordingly. The feu-charter I have already narrated, and an obligation by Mr Hadden binding himself and his successors in the office of treasurer to pay the feu-duty to Mr Dick and his successors in the office of Master of Mortifications, followed, and it is not disputed that all that the beneficiaries have since received from the subjects has been the free proceeds of the feu-duty of £50 a year.

Now, it is quite obvious that if this transaction be not protected by the long prescription of forty years, it cannot for a moment be supported on any ground known in law. The argument at the bar that it was the provost, bailies, and councillors of Aberdeen, and their successors in office, in their individual capacities, and not in their corporate capacity, who were trustees for the mortifications, will not hold water for a moment. The trust was vested in the corporation or community, and it was the representatives of the corporation or community who in their character of trustees for the mortifications sold the subjects in dispute to themselves in their separate character of a burgh or community. It is unnecessary to say that such a sale was quite illegal, even if it had not been gone about in the covert and collusive manner in which it was, to the manifest injury and defraud of the interests of the beneficiaries under the trust.

Then, as to the plea of the long prescription, I am clearly of opinion that neither the positive nor the negative prescription can avail the defenders in such a case. I had occasion to consider that question in circumstances greatly more complicated and more favourable to the plea than the circumstances of this case. I mean in the case of *Baird and Others v. The Magistrates and Town Council of Dundee*, decided in this Court on 5th February 1862, 24 D. 447, and in the House of Lords, March 1, 1863, 1 Macph. 6. The strength of the opinions of the majority of this Court in that case lay in the view taken by the Lord President, that the magistrates and town council were not there retaining or applying anything for the purposes of the burgh, but were simply alleged to have bestowed upon one class of poor persons a portion of the funds belonging to another class of poor persons, and which could not be got back again. His Lordship said—"I would have held a very different opinion in regard to an action against trustees who had kept possession of the property themselves, and had been mismanaging or misapplying it, and especially an action in reference to the future management of the property."

That did not appear to me to be a satis-

factory distinction, and accordingly I observe that I am reported to have said—"I desiderate any authority for saying that because they are trustees for two charities they can prescribe in favour of themselves in the one capacity and against themselves in the other capacity, although it was all along their duty to challenge and rectify in the one capacity what they did wrong in the other capacity." I have only to repeat that opinion as a *fortiori* applicable to the plea of prescription in the present case. The judgment of the House of Lords in *Baird's* case, reversing the decision of the majority of this Court, seems to me to leave that question no longer open. The previous case of *The Presbytery of Dundee v. The Magistrates of Dundee*, as decided in the Second Division of this Court on 19th March 1858, 20 D. 849, and afterwards in the House of Lords, has also an important bearing on the question of prescription; but as I had occasion to go into that matter very fully in the case of *Baird*, I do not resume it here.

The question which remains in the present case as to the salmon fishings is a more difficult question than that which relates to the lands.

The defenders have a grant from the Crown of these fishings dated 27th February 1804, being more than forty years ago. It bears to be conferred upon them "*propter favorem*," in their corporate capacity, and it is contended that the pursuers cannot competently get behind that grant to show that it is held in trust for them—1st, Because it is fortified by the long prescription as a grant not only to but for the benefit of the corporation; 2d, Because there is no written evidence of that trust sufficient to satisfy the Statute 1696, c. 25; and 3d, Because it does not in any view sufficiently appear that the Crown would have granted the fishings in trust for the mortifications in respect of the proprietorship of the lands, nor that the grant would not have been made to and for the benefit of the corporation although possessed of no adjacent or neighbouring lands.

As regards prescription, and indeed as regards the defenders' pleas generally, I have great difficulty in distinguishing the question as to the fishings from the question as to the lands. The one transaction appears to me to have been just the carrying out of the other to its natural and contemplated completion. Very soon after completing the title of the burgh to the lands, the defenders set about an investigation into the nature and capability of the fishings locally connected with the lands, with a view to applying to the Crown for a grant of these fishings, with the probable value of which they were previously pretty well acquainted. In the print furnished to us of the minutes of meetings of the town council there is a *hiatus* between the date of the town's infeftment in the lands in April 1797 and the 1st July 1801, but it appears from the minute of meeting of that date that a remit upon the subject of the fishings had been made to a committee on 1st October 1800, and that at the meeting on 1st July following, the Provost, on behalf of the committee, reported that the committee had been "advised to apply to the Crown for a grant thereof in favour of the Treasurer of Aberdeen as standing infeft in and proprietor of the adjacent grounds of Torrie along the said part of the sea coast,"—in pursuance of which

report a petition had been presented to the Lords of the Treasury in the Council's name for such a grant, which had been remitted to the Barons of Exchequer, and by them to the King's Remembrancer.

The petition itself sets forth that the treasurer of the burgh stood heritably infeft and seised for the use and behoof of the petitioners, the provost, bailies, treasurer, council, and community of Aberdeen, in All and whole that part of the east division of the lands and barony of Torry therein described, being the lands and others acquired from the Master of Mortifications in the manner already explained,—that salmon fishings might be advantageously carried on in the sea adjacent to the foresaid lands, and where no private right "has been formerly granted or established it has been the practice of the Crown graciously to grant such right to the heritors of the adjacent lands, which occasions the trouble of this application to your Lordships." On this footing the petitioners prayed the Commissioners of the Treasury to move His Majesty "to grant to the Treasurer of Aberdeen, for behoof of your petitioners, a right of salmon fishings in the sea opposite to the aforesaid lands;" and on this footing, so far as appears, the grant was ultimately made.

This petition was very solemnly signed and authenticated as the act of the corporation by the signatures of the Provost and Treasurer appended thereto in name and presence and by appointment of the provost, bailies, treasurer, council and community, and by attaching thereto the corporate seal, all on 16th May 1801.

I can have no doubt that this petition is admissible and competent evidence to get behind the terms of the Crown grant as in a question between trustor and trustee, supposing the proof to be limited to writ or oath of party in terms of the Act 1696, c. 25. It may or may not be thought sufficient to prove the fact that the grant was given to the defenders as proprietors of lands which they held in trust for the mortifications, but its admissibility and competency as evidence under the statute is undoubted. A probative document under the hand of the alleged trustee or trustees is not required by the Act. Any document signed by him or them is admissible and sufficient for that purpose if the trust be thereby acknowledged, as was decided in the case of *Taylor or Bryson v. Crawford*, 14th November 1833, 12 S. 39. If the petition be admissible and competent evidence, it would be very difficult to say that the memorials and other relative documents presented in explanation and support of that petition could be excluded under the Act 1696, c. 25; and if these be admissible in evidence, they make it very clear, not only that it was exclusively in their character of proprietors of the lands in dispute that the petitioners applied for the grant of the fishings, but that the petition was really only the following out of the illegitimate transaction by which they acquired the lands in 1797. The excerpt printed from their memorial bears, *inter alia*—"The memorialists are asking no more in the present case than what should belong to every proprietor at common law, namely, a right to fish for salmon opposite their own lands. It was with this view accordingly that they purchased the greater part of these lands, and reserved from the feu-rights,

which they afterwards granted, a space of ground along the coast for the purposes of fishing."

While, however, I think there is here competent and admissible written evidence even as in a question of trust under the Act 1696, I am not to be understood to be of opinion that the statute is applicable to a case of this kind. That statute proceeds on the narrative that the practice of granting blank bonds and other blank writs, "as also that the entrusting of persons without any declarator or back-bond of trust in writing are occasions of fraud, as also of pleas and contentions," therefore blank writs were in future declared null; and it was enacted that no action of declarator of trust should be sustained "except upon a declarator or back-bond of trust lawfully subscribed by the person alleged to be trustee, and against whom or his heirs or assignees the declarator shall be intended, or unless the same be referred to the oath of the party *simpliciter*."

The object of this enactment was to discourage latent trusts by subjecting the truster to the risk of being taken advantage of by the trustee unless he could produce written evidence of the trust, and at the same time to protect third parties *bona fide* dealing with the trustee as apparent proprietor from the risk of having their rights defeated by parole testimony of a latent trust. It is a ruled point that the Act does not apply to questions with third parties, but only as between truster and trustee. It contemplates a transaction between two parties—the one the granter of the acknowledgment of trust, and the other the receiver and holder of the document. That enactment cannot, I think, apply here, where the same parties were both trusters and trustees. They might no doubt have voluntarily executed a declaration of trust, but if they did not choose to do so there was no party to demand or exact from them such a document. They were themselves the sole representatives of the only parties who had an interest to insist that such a document should be executed, and the defenders availed themselves of their fiduciary character to claim the grant for themselves which they ought to have claimed for the benefit of the trust, if they claimed it at all. It is not, however, necessary to decide whether the Act 1696, c. 25, is or is not applicable here, because, supposing it to be so, there would still be enough written evidence clearly competent and admissible to prove the trust. The transaction as to the fishings was in either view just, as I have said, the following out and completing the illegal transaction by which the defenders acquired the lands; and on the whole I do not think it is in their mouths to plead a distinction, either as respects prescription or any of their other pleas, between their position as alleged proprietors of the lands and as alleged proprietors of the fishings. In short, I am of opinion that it ought to be found and declared that both lands and fishings, so far as the interests of the present pursuers are concerned, are held by the defenders in trust for behoof of the mortifications and beneficiaries whose rights are here sought to be vindicated. The terms of the interlocutor to be pronounced, in order to place the titles on a proper footing with reference to the conclusions for declarator and reduction respectively, and likewise for giving due

effect to the petitory conclusions so far as insisted in, may require consideration, but in the general result I think the pursuers must be held to be successful.

LORD MURK—At this late hour of the day I will not detain your Lordships further than by stating that I never had any difficulty whatever in concurring with the Lord Ordinary on the first branch of this case, viz., that the lands in question were held in trust for these mortifications. I think the proceedings shew quite distinctly that the lands were purchased by the town from the town, being part of the property which they held in trust for the mortifications. The statements in condescendence, article 10, and the answer put that beyond all doubt; and in these circumstances, after the decision in the cases of *Baird and Others* (*supra*) to which Lord Deas has referred, no plea of prescription can avail the parties or entitle them to hold the lands under any other condition than in trust for the mortifications.

The question of the fishing is certainly attended with a good deal of nicety; but we must keep in view the broad fact, that at the date when these fishings were acquired the lands *ex adverso* of which they lay were held by the town in trust for the mortifications. It was in respect of the town so holding these lands that they applied for the grant, and it was given to them on that account. The charter no doubt contains the usual words about its being for the benefit of the community, but it declares that the grant made to the treasurer is a grant of the salmon fishings in the sea adjacent to the lands which the treasurer holds for the community. Now, the treasurer did not hold these lands for the benefit of the community. The community held the lands for the benefit of the mortifications, and they state in their petition as the ground of asking for the grant, that "where no private right had been formerly granted or established it has been the practice of the Crown graciously to grant such right to the heritors of the adjacent lands." In respect of this application the Crown took the matter into consideration, and ultimately made a grant of the fishings. In these circumstances it appears to me that the principle upon which we proceed in disposing of the question of the lands applies as clearly and distinctly to the fishings. They took them as parties holding a property for the benefit of the mortification, and they must be held upon the face of their own petition and the proceedings following upon it to have acquired the fishings under the same condition, of holding them for the benefit of the trust-estate. I therefore concur with your Lordships.

LORD ARDMILLAN was not present at the advising, but it was announced that he concurred.

The Court pronounced the following interlocutor:—

"The Lords having resumed consideration of the cause and heard counsel further on the reclaiming note for the University of Aberdeen and others against Lord Young's interlocutor of 22d March 1875—Recal the said interlocutor: Find that the lands specified in the conclusions of the summons were purchased in 1704 by the corporation of

Aberdeen with funds belonging to the mortification mentioned in the 1st and 2d articles of the condensation, and to four other mortifications: Find that the said lands were held by the said corporation till the year 1797 on titles expressing *in gremio* the several trusts subject to which the lands were so held: Find that in the year 1797 the said lands were sold by the corporation, as trustee for the mortifications, to the said corporation for its own behoof, in consideration of a feu-duty of £50: Find that the said sale was illegal and void, and that the said lands, notwithstanding the said sale, are held and possessed by the defenders on the subsisting title thereto in name of the treasurer of the burgh of Aberdeen, subject to the trusts of the said mortifications: Find that the corporation in entering into the illegal transaction aforesaid acquired or attempted to acquire the said lands as the estate of the corporation itself, for the purpose of being thereby enabled to apply to the Commissioners of His Majesty's Treasury for a grant in favour of the corporation of the salmon fishings in the sea *ex adverso* of the said lands, according to a practice then prevalent of the Crown granting rights of salmon fishing in the sea to proprietors whose lands were bounded by the shore merely on the consideration of their being proprietors of such lands: Find that in pursuance of such purpose the corporation, in the year 1801, presented a petition to the Lords of the Treasury, setting forth that they were absolute proprietors of the said lands in their own right, and on that ground praying for a grant of salmon fishings in the sea *ex adverso* of the said lands, for the benefit of the corporation: Find that the prayer of the said petition was granted, and a Crown charter in favour of the corporation, conveying the said salmon fishings, was expedited, which is written to the seal and registered the 27th February 1804: Find that the corporation have ever since possessed and do now possess the said salmon fishings in virtue of the said charter: Find that the corporation, being the trustee for the said mortification, having thus used the trust-estate and the title thereof vested in them for the purpose of obtaining a benefit to themselves, are bound to communicate that benefit to the trust-estate and the parties interested therein, and are bound to hold and administer the said salmon fishings as part of the said trust-estate, and to apply the revenues and profits thereof to the benefit of the parties interested as beneficiaries in the said mortifications: Therefore find, declare, and decern in terms of the declaratory conclusions of the summons: Find, under the petitory conclusions, that the concurring pursuer Dr W. R. Pirie is entitled to a share of the revenues and profits of the trust-estate corresponding to his tenure of the Professorship of Divinity and Church History from December 1843, the date of his appointment, till the date of citation: Find also, under the petitory conclusions, that the late John Cruickshank, as concurring pursuer, was, and his representatives who have been sisted in his place are, entitled to

a share of the profits and revenues of the trust-estate corresponding to his tenure of the Professorship of Mathematics from or about the year 1833 till the year 1858: Find that the said shares of the profits and revenues of the trust-estate for the said periods may competently be ascertained and decerned for in the present action: Find the pursuers entitled to the expenses hitherto incurred by them; and remit to the Auditor to tax the account of the said expenses and report to the Lord Ordinary: Remit to his Lordship to proceed with the accounting in accordance with the above findings, and to proceed further as shall be just, with power to decern for the expenses now found due; and appoint this interlocutor and decree to be recorded in the Register of Sasines."

Counsel for the Pursuers—Asher—Jameson.
Agents—M'Ewen & Carment, W.S.

Counsel for the Defenders—Dean of Faculty
(Watson)—Keir. Agent—T. J. Gordon, W.S.

Thursday, July 20.

FIRST DIVISION.

[Lord Rutherford Clark, Bill Chamber.

FORGIE *v.* STEWART & M'DONALD.

Debtor—Creditor—Diligence—Liberation—Act of Grace.

When a debtor has been liberated under the Act of Grace he may be re-imprisoned by the incarcerating creditor upon the same diligence, but it depends upon the circumstances whether the Court will allow it.

A change of circumstances is not necessary before a debtor who has been liberated under the Act of Grace can be re-incarcerated, and he must show neglect or misconduct on the part of the creditor to entitle him to liberation.

This was a note of suspension and liberation presented in the Bill Chamber for John Forgie, sometime draper, Newcastle-upon Tyne, and then prisoner in the prison of Edinburgh, complainant, against Stewart & M'Donald, warehousemen, Glasgow.

The complainant stated that on 29th October 1875 he had been charged upon a decree obtained against him by the respondents in the Court of Session for £225, 16s. 4d. besides interest and expenses; and on 18th November following he had been incarcerated in the prison of Edinburgh upon a fiat granted for that purpose. He then applied for aliment, which was granted, and fixed at 1s. per day. It was duly paid till 20th June 1876, when, the complainant having been left without aliment, the usual certificate was sent by the governor of the prison to the bailies of the city, who thereupon granted warrant for his liberation. Upon 23d June, without any new charge or warrant of imprisonment he was re-incarcerated at the respondents' instance. He stated that there had been no change in his circumstances, and that he could make no exertion to earn money to pay the debt while in prison,