receipt produced, it is extremely reasonable to say, that he shall be bound by the bill, unless he can shew by the writ or oath of the party, that he is not liable. But this is a defence of a different nature. It is a defence arising from the position in which this defender stood towards the parties. And that depends upon a variety of facts. It is a complicated defence, and to say, that in such a case the non-liability can be proved only by the writ or oath of the party, seems to me unreasonable. All I can say at present is, that no case has been cited precisely of the same nature.

Upon the whole, I think the judgment of the Court is right, and therefore I concur with my noble and learned friend, that the judgment should be supported, and that the appeal should be dismissed with costs.

LORD CHELMSFORD.—My Lords, I must confess, that during the course of the very able argument on the part of the appellant, I have entertained very considerable doubt as to the regularity of some of these proceedings, but having listened to the reasons which have been given by my noble and learned friends in support of the interlocutors, I am glad to be able to concur in the opinion that the interlocutors ought to be affirmed.

Interlocutors affirmed, and appeal dismissed with costs.

For Appellant, J. F. Wilkie, S.S.C., Edinburgh; Deans and Stein, Solicitors, Westminster. —*For Respondent*, Macbrair and Parker, W.S., Edinburgh; Simson, Traill, and Wakeford, Solicitors, Westminster.

MARCH 3, 1863.

JOHN BAIRD and Others, *Appellants*, *v.* MAGISTRATES OF DUNDEE, *Respondents*.

Testament—Legacy—Trust—Mortification—Long irregular dealing—Negative Prescription—Poor—*J. in* 1639, *bequeathed to the Magistrates of D.* £1000 *to be invested for the yearly maintenance of aged people of D. The Magistrates bought land, and vested it in an existing hospital managed by themselves and the Council of D. for the poor of D. and orphans, and the land was managed for* 200 *years by them and the Council.*

HELD, *That after the lapse of time, the J. bequest must continue to be managed by the Magistrates and Council of D., but that the funds must be applied for the aged poor according to J.'s will.*[1]

The pursuers appealed, maintaining in their case, that the judgment of the Court of Session should be reversed, because—1. It was competent for the Court of Session to have pronounced a decree in terms of the first and second conclusions of the summons, and to have refused to entertain the other conclusions against any of the defenders, and in particular, against the respondents. 2. The purposes of the will were those alone for which Johnstone's bequest was received, and in fulfilment of which the purchase of Monorgan's Croft was made; and because the judgment appealed against was in opposition to the judgment of the House of Lords in the case of the Presbytery against the Magistrates of Dundee.[2] 3. On the assumption that the Provost, Magistrates, and Council were now legally in the administration of Johnstone's bequest, there had been no administrative acts adverse to or inconsistent with the purposes thereof. 4. If there had been any acts of the Provost, Magistrates, and Council in the administration of Johnstone's bequest, adverse to, or inconsistent with, the purposes thereof, their administration was usurped and illegal, as the proper trustees in the bequest were the Provost and Bailies of Dundee. 5. The respondents' plea founded on the mere lapse of time—the negative prescription—had no foundation in the circumstances, and no application to such a trust as Mr. Johnstone's. 6. Even if prescription were applicable at all, it strengthened the title of the respondents, or of the Hospital Master, their officer, as holding the property for behoof of the proper administrators of the bequest, or (if the Provost, Magistrates, and Town Council were legally in the administration of the bequest) for the proper and only beneficiaries therein. *Gordon's Trustees* v. *Eglinton*, 13 D. 1381, *per* Lord Justice Clerk Hope.

The respondents in their *printed case*, supported the judgment on the following grounds :—

1. On the shewing of the appellants in the record, the possession which the Provost, Magistrates, and Town Council of Dundee acquired, and had ever since had, was adverse to the title

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[1] See previous report 24 D. 447 : 34 Sc. Jur. 215. S. C. 1 Macph. H .L. 6 : 35 Sc. Jur. 305.

[2] See report of case alluded to by the LORD CHANCELLOR, viz. *The Magistrates of Dundee* v. *Presbytery of Dundee*, 4 Macq. Ap. 228 : *ante*, vol. i. p. 1078 : 35 Sc. Jur. 274.

of the proper trustees and beneficiaries; and no claim having been made, or action brought, at the instance of the proper trustees or beneficiaries for the period of forty years and upwards after emergence of the alleged right of action, such right of action had been lost by negative prescription. 2. As the case made by the appellants in the record was, that, according to the correct reading of Johnstone's will, the Provost and Bailies alone were the persons nominated and intended to be appointed by him trustees of his legacy to the town of Dundee, and that the Provost, Magistrates, and Town Council had no right, on the true construction of the will, to be trustees, the present appeal must be decided on that footing. 3. The facts of the case being in accordance with the shewing of the appellants, as stated in the first reason, the claim of the appellants was therefore cut off by the negative prescription. 4. The title to Monorgan's Croft having been taken nearly two hundred years ago in favour of the Hospital Master, for behoof of the poor of the hospital, and as it bore no reference to Johnstone's will, or the trusts thereof, and as the property had ever since been possessed under charter and sasine, and administered for behoof of the poor of the Hospital, in these circumstances, not only was the appellants' claim and right of action barred by the negative prescription, but the respondents' right and title to the subjects were fortified and established by the positive prescription.

Rolt Q.C., and *Thoms*, for the appellants, contended, that the Court of Session ought to have pronounced a decree in terms of the first and second conclusions of the summons, and declared the funds applicable exclusively to the aged and impotent. (In the course of the argument the parties consented to the following arrangement):—

LORD CHANCELLOR WESTBURY.—Have you any objection to accept the statement with respect to Monorgan's Croft contained in the interlocutor of the Court of Session on the 26th of last month?

Mr. Rolt.—I leave it in your Lordship's hands.

LORD CHANCELLOR.—We cannot take notice of that interlocutor, further than that the finding contained in it would enable us to ascertain that Monorgan's Croft and the buildings thereon, subject to the question of boundary, represent Johnstone's legacy. I put it to you merely as a question, because I do not know what may be the view of my noble and learned friends. But supposing the House should come to the opinion, that the Provost, Bailies, and Town Council, having regard to the lapse of time, ought to be regarded as trustees of the property which represents Johnstone's legacy, and supposing the House were to declare that, having regard to the finding contained in the interlocutor of the Court of Session of the 26th of last month, which had been accepted by the present appellants and by the respondents, Monorgan's Croft and the buildings thereon represent Johnstone's legacy, and supposing the House were to declare, that the property representing that legacy ought to be considered as held by the Provost, Bailies, and Town Council, in trust to be applied for the maintenance of the aged and impotent people of Dundee, and with that declaration were to remit the cause to the Court of Session to settle and approve of a scheme for the application of the revenues of that property—what would you say to that? I merely put it to you as a question.

Mr. Rolt.—I should be content.

LORD KINGSDOWN.—Lord Advocate, you agree that the pursuers upon this record, according to the law of Scotland, represent all the interests under Johnstone's will?

Lord Advocate.—They do not represent all the interests, but they have sufficient title to enable them to pursue this suit.

LORD CHANCELLOR.—My noble and learned friends wish me just to repeat what I stated before, merely for the purpose of seeing whether the learned counsel have anything to suggest with respect to it. Let us for a moment suppose, that our order will run in the following form: It will first mention the interlocutor of the 26th of last month, and will state, that by consent of the parties, that interlocutor has been laid before the House. It will then declare, that having regard to the length of time during which the Provost, Bailies, and Town Council of Dundee *per se* administered the charity, they ought to be considered as the lawful trustees of the interest represented by Johnstone's legacy. It will then declare, that Monorgan's Croft and the buildings thereon are subject to the trusts declared by Johnstone's legacy of £1000. It will declare, that the revenues thereof and of any further property that may be found under the inquiries hereinafter directed, ought to be applied for the benefit of the aged and impotent people of Dundee, according to a scheme to be settled by the Court of Session. It will then refer the matter back to the Court of Session, to inquire whether there be any other property which will arise from Johnstone's legacy. And it will direct the Court of Session to settle a proper and fit scheme for the application of the rents and revenues of Monorgan's Croft, and of any other property that may be found as the result of inquiry, in such manner as the Court of Session should deem fit. We shall like to hear any suggestion that may be made upon this subject.

Mr. Rolt.—On the part of the appellants I see no objection to that.

Lord Advocate.—We have no objection on the part of the respondents.

Mr. Rolt.—Your Lordships will deal with the costs of the pursuers, and of all parties.

LORD CHANCELLOR.—With regard to costs, would it not be better to refer it back to the

Court of Session, to consider in what manner the costs of all parties to this appeal shall be dealt with? They might consider that question in settling the scheme for the application of the revenues of Monorgan's Croft. Individually, subject to whatever my noble and learned friends may state, it would appear to me now, that this action, whatever it was in its origin, may possibly be made to serve a useful purpose. The House is well satisfied with the disposition shewn by both sides, both by the appellants and the respondents, to convert the proceeding to a useful purpose; and unless, therefore, my noble and learned friends dissent. I should be myself individually disposed to propose, that these costs should come out of the fund.

Mr. Rolt.—That will apply to the costs below, as well as here.

LORD CHANCELLOR.—My Lords, it is the earnest desire of your Lordships to convert the proceedings, which are now brought before you, to a useful end in the administration of this charity, and it must be a pleasure to your Lordships to find, that your desire in that respect has been assisted by the parties before you. I think no reasonable doubt can be entertained, that seeing that the administration of this fund has been in the hands of the Provost, Bailies, and Town Council of Dundee for a very considerable period of time, for more than two hundred years, in the character of trustees, that office and capacity ought not to be disturbed. I should therefore humbly propose to your Lordships, in the first place, to make a declaration, as the first part of the order of this House, that the Provost, Bailies, and Town Council, having regard to the length of time during which they have administered the charity, ought to be regarded as the lawful trustees of the fund and property resulting from Johnstone's legacy of £1000.

My Lords, as regards the next declaration, your Lordships will be aided very much by the fact that circumstances have been found and ascertained by an interlocutor in the Court of Session, very recently pronounced in another suit touching the condition of the property called Monorgan's Croft. I should therefore propose to your Lordships, that it be mentioned, as the prefix to your order, that that interlocutor of the 26th of last month has, with the consent of the appellants and respondents, been laid before the House. Then the next declaration will be, that the property called Monorgan's Croft, and the buildings thereon, subject to the question of boundary mentioned in that interlocutor, ought to be considered as property subject to the trusts declared by Johnstone in his will leaving the sum of £1000.

The next object will be to settle a scheme for the future application of that property, and of any other property that may be discovered, because at present it has not been finally ascertained, that there may not be some other property applicable to the purpose of Johnstone's legacy, *ultra* Monorgan's Croft and the buildings thereon. I should therefore propose to your Lordships to remit the cause back to the Court of Session, with a declaration, that the Court of Session should inquire whether there is any other property resulting from Johnstone's legacy besides Monorgan's Croft; and further, with a direction, that they should settle a scheme for the application of the revenues of the whole of Monorgan's Croft and the buildings thereon, and of such other property as may be found for the benefit and maintenance of the aged and impotent people of Dundee, in such manner and with such directions as they shall think fit, and with the declaration, that this House deems it fit that the expenses of the pursuers and defenders in the Court below, and also the costs of this appeal, ought to be paid to the appellants and respondents respectively out of the trust property; and the cause will be referred back to the Court of Session to give directions accordingly.

That would be the substance of the order which I should humbly submit to your Lordships. It will require some little care to draw it up; and with your Lordships' approbation, I will myself take care that it be reduced properly into writing, and handed over to the Clerk of Parliaments for the purpose of being shewn to the parties.

LORDS KINGSDOWN and CHELMSFORD concurred.

Interlocutors reversed, with declarations, directions, and remit as above.

For Appellants, Lindsay and Paterson, W.S., Edinburgh; Dodds and Greig, Solicitors, Westminster.—*For Respondents*, Maclachlan, Ivory, and Rodger, W.S., Edinburgh; Loch and Maclaurin, Solicitors, Westminster.