

second place, the Scotch judgment was given in Scotland, which was the domicile—the country—in which the action was brought. Therefore I take it that it is quite plain that if the decision of the Court of Chancery is to be considered as a foreign judgment, which probably it is in Scotland, no question of enforcing it arises here.

The question is entirely reduced to this one point, and this one point only, Were the matters alleged new? The Phosphate Company say that in the present appeal against the second decision of the trustee they rely upon the amended bill. The new matters are very easily seen there, because they are printed on the bill in red ink. They are alleged in the condescendence upon which the parties proceeded in the present case. They proceeded upon these new matters in their bill, and the question, I apprehend, comes to be at once, Are these new matters? I think it amounts in substance to this, that it was found out—but not too late to put it in the proceedings in the present case—that amongst other means of carrying out the fraud the Lawsons had been parties to giving a bribe of £15,000 to Engelbach and Keir, who were parties to the fraud.

My Lords, upon the question whether that is a new *medium concludendi* or merely a piece of evidence tending to support the former case, I am very clearly of opinion that it is only a fresh discovery of evidence—a fresh ingredient tending to prove the fraud upon which they relied. I do not enter into the details upon which I found that opinion. They were stated first of all very clearly by Lord Shand in his judgment, and they have been since stated very clearly by my noble and learned friend on the woolsack, and by my noble and learned friend opposite, and I am not going to waste your Lordships' time by trying to throw fresh light upon what has been three times, to my mind, most satisfactorily stated.

LORD GORDON concurred.

Interlocutors appealed against affirmed, and appeal dismissed with costs.

Counsel for Appellants—H. Davey, Q.C.—A. Young. Agent—John Holmes, Solicitor.

Counsel for Respondent—Arthur Cohen, Q.C.—Mackintosh. Agents—Laurance, Plews, & Baker, Solicitors.

Monday, July 21.

THE MAGISTRATES AND TOWN COUNCIL OF
EDINBURGH v. M'LAREN AND OTHERS.

(Before Lord Hatherley, Lord Blackburn, and Lord Gordon).

Trust—Immixing of Charity Funds—Increased Value of Estate—Proportional Division of Profits.

The funds of a specific mortification which were made over to a corporation for certain purposes about the year 1700 were immixed with other funds held by the same corporation in trust for the same object, and they were administered in common. The accounts were kept and payments were made in a

mixed and unseparated form. In various other particulars the conditions of the bequest were not complied with, but not from any improper motive. Held (1) that no lapse of time could interfere to prevent the testator's intention from receiving effect, and that the bequest fell to be administered upon that footing; (2) that the mortification fund had become so immixed with the other fund belonging to the corporation that it must be taken to have participated proportionally with them in the increase of value of the aggregate funds which had taken place since the date in question.

This was an appeal against two interlocutors of the First Division of the Court of Session dated 10th July 1875 and 19th March 1878, taken by the Magistrates and Town Council of Edinburgh in an action against them at the instance of the beneficiaries of the Trinity Hospital of Edinburgh. The Lord Advocate appeared also as a party to the action in virtue of the Trusts (Scotland) Act 1867 (30 and 31 Vict. c. 97).

The facts of the case sufficiently appear from the opinions of Lord Blackburn and Lord Hatherley. The case is not reported upon this branch of it in the Court of Session.

At delivering judgment—

LORD BLACKBURN—My Lords, the Town Council of Edinburgh were the administrators of Trinity Hospital, and as such held considerable funds before the year 1696. In that year Mr James Alexander died, having previously made a mortification to the Lord Provost and Town Council of Edinburgh and their successors in office, and the ministers of the said burgh present and to come. The ministers at that time did not take any steps to assert their right to join in administering this mortification. The Council got possession of the funds, and from the time they did so down to the making of the interlocutor appealed against administered those funds as if they had been mortified to them as administrators of the funds of Trinity Hospital.

In a suit for the proper administration of the funds of Trinity Hospital the Court of Session had to decide a great many questions. Two and two only of their decisions are now by this appeal brought before this House—1st, The Court of Session decided that the funds of the Alexander mortification ought to have been from the beginning administered by the Council and the ministers, and not by the Council alone, and that notwithstanding the length of time during which a contrary practice had prevailed they could not sanction it in future; and that the funds of that mortification must be in future administered, in terms of the mortifier's trust, by the Council and the ministers.

This was the first decision appealed against. I think none of your Lordships who heard the argument doubted that the Court of Session could not have decided otherwise, and the counsel for the appellants were not able to urge anything substantial against this decision.

But then, having determined that the Alexander fund was to be administered separately in future, there arose a question, what was the fund which was to be so administered? I do not think that I can state the point more briefly than is done by

the Lord President. He says—"The funds left by Mr Alexander were invested in particular securities, and those securities were not called up or changed until about the middle of the last century, and we have distinct evidence of what the amount of the fund was at that time. Now, if we proceeded upon the principle of a strict accounting against the magistrates here as trustees, of course the way of bringing out the balance would be to charge them with this capital as at the date when we find it in their hands, and then charge them with the income as it accrued, and let them discharge themselves the best way they could. But it rather appears to me that in a case of this kind, and looking to the nature of the trust and the way in which it was necessarily administered, that would be too strict a principle of accounting; and while I think it is our undoubted duty to separate this Alexander fund, and secure that it shall be administered as a separate trust in all time coming, we may deal with by-gones in a way more favourable for the administrators of Trinity Hospital. The income of the fund has apparently been spent, and it has not been spent, so far as we can see, upon purposes alien to the intentions and wishes of the founder. His wishes and intentions have only been to a certain extent disregarded—that is to say, the fund has not been in the right hands of administration, and there has not been in the selection of the objects of the bounty that order of preference which he desired. But still the fair result of the evidence appears to be that, at all events for a very long period, the income of the Alexander fund was bestowed upon poor and indigent persons of the kind generally here contemplated. It was employed along with the income of the other funds of the Hospital generally for such purposes, and therefore I cannot see that there can be, especially against a shifting body of trustees like the Magistrates and Town Council of Edinburgh, any responsibility for the expenditure of that income. It is not alleged that they appropriated this fund to their own purposes as individuals, or that they appropriated it to the uses of the Corporation of the City of Edinburgh. If that had been so, it would have raised a question of a very different kind. But that does not appear to have been so, and therefore I incline to the opinion that in so far as regards the past income of this fund there is no room for any accounting at all.

"But then the next question comes to be—How are we to ascertain what sum now in the hands of those trustees will adequately and fairly represent the capital of the Alexander fund? Now that is a question of some difficulty, but at the same time I think it admits of a solution. We know that the Alexander fund was invested upon two bonds, as it was originally settled by the donor himself—the one upon the Annandale estates for £1725, 17s. 8½d., and the other upon the Westerhall estates for £544, 13s. of sterling money, for I am speaking now of the amount as converted into sterling money and actually paid up in the course of last century. These two sums amount together to £2270. Now, the mortification was in the year 1695, and it may certainly be assumed without any great stretch that that money came into the hands of the Hospital trustees by the beginning of the last century, say in the year 1700. Therefore they

were possessed in 1700 of this capital sum as representing the Alexander mortification. They were at the same time possessed of a very considerable estate belonging to the Hospital, and it is not at all difficult to ascertain what the amount of that estate was. In that way we discover what was the relative or comparative value of those two estates in the year 1700. But it is very apparent upon the face of the report before us, and the abundant information which we have on the subject, that this joint mixed estate, consisting to a large extent of the funds and estate of the Hospital proper, but also to a more limited extent of Alexander's fund, has largely increased in amount and value between the year 1700 and the present day. Now, it seems to me that this estate so jointly administered having greatly increased in value between these two dates, the Alexander fund must be entitled to participate in that prosperity. Thus, supposing that in 1700 the estate of the Hospital proper amounted to £10,000 in value, and the Alexander fund to £2,000 in value, making together £12,000, but that at the present day the joint-estate as it appears in the hands of the administrators amounts to £50,000 in value, then that £50,000 must be apportioned between the same funds in the same proportion that they bore to each other in the year 1700—that is as 10 to 2. I am taking the figures I have mentioned as entirely suppositious, not supposing they represent the entire value by any means. On the contrary, the value as we see is very much greater. Now, there may be some little difficulty in adjusting the precise way in which this result is to be brought about." He then proceeds to give various directions as to what was to be done in ascertaining the amount, which I need not further notice.

No other way was suggested at the bar in which the fund, if the two were inextricably mixed up, could be apportioned except that of taking the proportion which the two funds bore to each other and dividing the mixed fund in that proportion, and I cannot myself see any other way. But it was argued that the two funds were not inextricably mixed up, and the point which the appellants' counsel made was fairly raised by the facts as to the purchase of the Dean estate. It appears that the Town Council in 1734-39 purchased this estate for £3,675. In course of time that estate has become part of the town of Edinburgh, and is now worth a very large sum of money, and this has been a profitable investment. At dates subsequent to 1734 they invested funds in city bonds, and the city having become insolvent and compounded with its creditors, this has been a losing investment.

The decision of the Court of Session is that the investments are to be taken as made for the mixed funds, and that on the figures supposed by the Lord President the Alexander fund is entitled to two-twelfths of the profit made by the profitable investment in the Dean estate, and is to bear two-twelfths of the loss on the unprofitable investments in city bonds. And the result of that will be that in administering the Alexander fund the administrators will have the management of a very considerably larger sum than what the testator Alexander had and mortified in 1695. The contention of the appellants is that the investment in the Dean estate is to be considered as made

exclusively for the benefit of Trinity Hospital, and that the Alexander fund will have no share in the profitable investment, but will have to bear a share of the loss in the subsequent investments, so that the fund now to be administered as the Alexander fund will be less than what the mortifier left in 1695. This is a result which does not at the first view seem so fair and just as that produced by the decision of the Court of Session.

In order to understand the grounds on which their argument is based it is necessary to examine what the facts were. The testator Alexander left in 1696 the funds available for his mortification invested in two bonds. The administrators of Trinity Hospital by usurpation became possessed of the control of both those bonds before 1734, and they in fact received the interest on those bonds and mixed the interest thus received with the revenue which they received from the property of Trinity Hospital, and from that mixed revenue defrayed the expenses which they incurred for the whole charity without making any distinction whatever as to whether those expenses were incurred for objects under the terms of the Alexander mortification or for purposes proper under the Trinity Hospital charity only. This is clearly proved by the account for the year 1722, which was in process though not printed, and which was produced at the bar during the argument. No doubt this was wrong, but, as pointed out by the Lord President in the passage I have read, these purposes were not alien to each other, and though wrong, this was not a wrong like what it would have been if they had appropriated to their own purposes. But though they treated the funds as one, the two bonds remained in specie just as Alexander left them, not called-up.

When the Council bought the Dean estate in 1739, they gave directions to their treasurer to pay for it, and for that purpose to uplift some securities, including the bond over Westerhall for £544, 13s., which was one of the bonds left by Alexander. Nothing could more clearly prove that in making the investment the Council were (as far as intention went) intending to make an investment for the behoof of the whole mixed fund which they, improperly it is true, treated as one fund. But the treasurer did not follow these instructions. In his account, after showing what the whole disbursements in paying for the Dean estate and improvements on it had been, and that there remained a balance of £465, 18s. 5d. unpaid, he adds this—"Tho' the accountant was authorised by the Council to uplift £544, 13s. st. contd. in Sir James Johnston's hereble. bond to the Hospital to replace the above charge, which, as it was well secured and the interest duly paid, he judged it more for the interest of the Hospital to uplift only the sum due by Mr John and Mr Charles Cockburn, their bond being £200 st., and the meantime to advance the rest himself—£200. Balance due to him on acct. of the enclosing, £265, 18s. 5d." Consequently the two bonds remained in specie not called up for some years later.

The argument founded on this was, that as the bonds remained in specie, and earmarked as it were, and as it appeared that the estate of Dean was in fact paid for out of funds originally belonging to Trinity Hospital, and uplifted for that purpose, it followed as a matter of law that, whatever the Council intended, the funds must be

followed, and that the Dean estate belonged exclusively to Trinity Hospital. According to this reasoning, if the treasurer had obeyed his instructions the Alexander fund would have been entitled to share in the Dean estate in the proportion which £544, 13s. bore to the whole cost. As he did not, they are to have no share in it.

This makes the question depend entirely on an accident, and is not a satisfactory result; still if the law was settled that it was so we must follow it. But I do not think there is any case, either in England or Scotland, in which such a question has been raised. No doubt when the question has been whether those who represented the trust could claim property on the ground that it was procured by trust-funds which they had a right to follow, the identity of the fund is all important. But such a case as the present as to an investment has never that I can find been raised.

In *Pennell v. Duffell* (4 De Jex, Macnaghten, and Gordon, 372) it might have been raised, but those entitled to the different estates which then were proved to be jointly entitled to the fund very sensibly settled the proportions in which they were entitled without going to law about it.

Being therefore, as I think it is, a new question, it must be settled on principles of justice. Speaking for myself alone, I should have had great difficulty in deciding this case if it had come before me as sitting in the Court of Session. I doubt whether I should have had acuteness enough to discover the mode in which the Court of Session have solved the difficulty. But they have solved it in a way perfectly consistent with justice and good sense, and not inconsistent with any technical rule of law, and no other solution has been suggested which would be so satisfactory. I certainly therefore am not prepared to advise your Lordships to reverse the judgment below, especially seeing that I am not prepared to advise your Lordships to adopt any other rule.

I move, therefore, that the interlocutors below should be affirmed and the appeal dismissed with costs.

LORD HATHERLEY—My Lords, I have had the advantage of seeing in print the opinion of the noble and learned Lord who has just addressed your Lordships, and I have nothing to add to the statement of facts therein contained.

It appears that the first unfortunate step which was taken in this matter, erroneously, although no doubt in perfect good faith, was the exclusion of the ministers who were particularly pointed out in Alexander's mortification to be joint trustees with the corporation of Edinburgh of the fund that he left for the purposes, under certain limitations, of Trinity Hospital. The ministers being shut out from it, the fund was administered entirely by the Provost and Council of Edinburgh. This circumstance no doubt led to the confusion which afterwards took place in the accounts. The Provost and Council of Edinburgh were properly trustees of Trinity Hospital, and they had several other mortifications also which were made over to them for Trinity Hospital, and this Alexander mortification appears in a sense to have been one also for the benefit of Trinity Hospital, or rather for the benefit of the persons who were to be received therein, that being a charity. It was limited, however, in its operation by certain rules with reference to

the kindred of the founder. He was particularly anxious that those kindred should be admitted to it, and that until they failed the fund should be used for that purpose. However, the Provost and Council of Edinburgh placed all those funds which they held in any way for the benefit of Trinity Hospital in one common stock, as it were, and kept one common book of accounts with relation to them.

I asked once or twice during the argument whether there was any separate account kept anywhere of the Alexander mortification, and was answered that the report of Mr Macpherson was in this respect perfectly correct—that the funds of the Alexander mortification had been “immixed” with the other funds held by the corporation in trust for the Hospital. The consequence of that was that all the funds, including the Alexander mortification, have been dealt with as one common fund to be administered as the Provost and Council might think proper for the benefit of the Hospital. This is not a case, as was remarked in the Court below, and as has been remarked again just now by my noble and learned friend, in which any improper motives have actuated the corporation—that is to say, the Provost and Council of Edinburgh—as trustees. They no doubt thought that they were performing their duty in doing that which they did; but at the same time the consequence has been unfortunate, because it has become necessary to separate these funds which are held on separate and distinct trusts; and it being necessary to separate them, the question is, how is that to be done now, when, according to the report of the referee Mr Macpherson, the funds have become inextricably immixed?

My Lords, a very hard struggle was made, by Mr Kay I think, upon that part of the case, namely, with reference to the funds being capable of being still pointed out as separate and distinct. Now up to a certain time there was truth in this. The corporation became masters of the fund, as it is stated, somewhere about the year 1700. As far as appears from the report or the evidence, they were at that time masters of the fund, which consisted of two heritable debts due from the Annandale estates and another estate connected with them, the separate sums amounting together to the sum which was mentioned in my noble and learned friend's statement. Those debts were not gathered in until certainly after the year 1734 or 1735, in fact not until after 1740, and the purchase of the Dean estate was made at a period anterior to their being so called in, but the interest on those bonds was received and was credited to the common fund before that time. We have had an opportunity of seeing the accounts for one year, and it appears that the payments were made entirely in a mixed and unseparated form, indifferently from the interest of one fund or the other, or from the interest of one or of all the funds which were held by the Provost and Council of Edinburgh. My Lords, that being the case, it became impossible from that time to separate the interest, as Mr Macpherson tells us, and of course we looked to the counsel for the appellants to make out if they could that Mr Macpherson was wrong in that respect, and that the interest could in fact be separated. No attempt, however, has really been made, or if it

has been made it has not been successful, to show that the interest of these funds was at any time kept separate and distinct. In due time afterwards the capital was gathered in, and what became of it? It may partly be traced to the debts which pressed upon the corporation, I apprehend, and it may partly be traced for a certain time to certain other payments, but after a time the funds became so inextricably immixed that there is no mode of separating them.

The appellants say, at all events, the corporation did not take the funds of the Alexander mortification for the purchase of the Dean estate, which is a source of profit to the corporation—they did not use them for re-investment in this Dean estate, which has turned out well for those who engaged in it, and we must keep these funds entirely separate from that advantageous purchase, inasmuch as we can show you that the identical funds which might be followed out as being what you were entitled to could not possibly have been laid out in the purchase of the Dean estate. In the events which have happened it would certainly be very much worse for them if they were taken to be left in the general body of the fund and so lost. What the Court seems to have regarded the corporation as having done may be described thus—if I may use an expression which bears more analogy to this than any other expression one could use—A sort of partnership was formed by these trustees between the various trust-funds which they held. They considered that they were justified in acting in the manner they did for the benefit of the Hospital. They said, we will carry all these into one joint-stock concern for better and for worse; and accordingly although there have been some alternations, the investment which was made by these trustees, improperly constituted in a sense, but still trustees of this particular fund, has turned out to be a beneficial investment.

Now, my Lords, I apprehend that what the Court below has done is only that which is commonly done in this country with reference to partnerships. The question came more frequently before our Courts at one time than it does now, because the principle is better understood. At one time, a long time ago, if a partner died leaving assets in the partnership, and the other members remaining in the partnership after his death carried on the business with his assets, there was felt to be a difficulty in coming to any arrangement as to what would be the correct mode of dealing with that fund. It was a recognised rule at all times that a *cestui que* trust whose property has been improperly dealt with has the choice of accepting the dealings with his property or repudiating it, that is, either of taking all the profit (he would not choose it if there had been loss) resulting from the dealing with his property, or requiring the payment back of his money with such interest as the Court thought right under the circumstances. There was found to be a difficulty about applying that to partnerships for some little time, but the principles of partnerships were discussed in the cases of *Brown v. De Tastet*, Jacob's Repts. 284, and in a case of which I do not just now remember the name, reported in the second volume of Mylne and Craig (*Wedderburn v. Wedderburn*, 1836, 2 Keen's Repts. 722, affirmed 4 Mylne and Craig, 41). When the principles were discussed in those

cases it was said that the difficulty having arisen in this way, inasmuch as something must be allowed for labour and attention and activity in the business—such remuneration, for instance, as the managing partner or a person somewhat in that position might be entitled to—the Court did not see its way to direct a simple account of the profits without more. However, in those cases it came to be settled at last that the proper course is to allow an account of all profit made since the death of the partner, and to give his estate a share of that profit according to the capital on the one side, and to debit his estate on the other side with “just allowances,” which of course includes everything which the Court might think just and proper. The principle was that the trust money having been used in the partnership concern, and profits having resulted from that use of trust money, no attempt should be made to separate all the different funds out of which money might have been paid, but the share of profits upon the trust money so used was to be ascertained according to the capital employed.

That, my Lords, is exactly what has been done here. It is a kind of partnership concern which has been carried on by the Provost and Council with their various trust-funds. The whole of the trust has made a profit; that profit the Court below has held ought to accrue for the benefit of that charity, the fund of which came into the hands of these trustees about the year 1700 as far as can be made out upon the evidence, as well as of the other trust-funds held by the same trustees. That is the principle upon which the Court has directed that the apportionment should be made.

Now, my Lords, in the case of a partnership, supposing it were necessary to lay out any money for the purpose of increasing the business during the time when the business was carried on with the aid of the deceased partner's assets in conjunction with other assets of the partnership—supposing it were necessary for the erection of a new building (take a brewery for example), or the like, to make payments—and profits were so earned, the Court would not be very strict to inquire out of which particular fund the money which was laid out arose, because when funds are employed jointly in this way you can hardly say that payments are made out of one fund rather than out of another fund. Here curiously enough there is a strong illustration of that in the entry which has been read by my noble and learned friend near me, from which it appears that it was actually intended at one time to apply these very funds to the particular purchase which was made of the Dean estate. But really that does not in substance make a difference if the whole concern has been carried on in a joint and mixed manner, and if the whole funds have been invested for the purposes of the whole concern if I may so term it. Believing as the Corporation did that the whole was one concern, it was upon the faith and confidence of their having certain assets in hand, of which the heritable bonds in question formed part, that they made the purchase which otherwise they would not have ventured to make for the benefit of the trust, any more than if it had been an actual partnership the partners would have ventured to make such a purchase for the benefit of the partnership unless they had funds in hand.

Now, my Lords, from about the year 1700 the

Provost and Council have had these funds amounting to £2000 odd of the Alexander mortification, and the interest upon them was at first very punctually paid, as the entry which has been read shows, although afterwards the state of things was different. The question arises after a long series of years in which this mistake has been made—for a mistake it has been held by the Court below to be, and that can hardly be disputed. The result of this long mistake is that happily, as things have turned out, the whole concern of this trust administered as one concern has been fortunate; the Alexander mortification partook in a speculation for which the funds of the concern were used, and it has been held by the Court below to be entitled to an equitable share of the profits so realised—that is what it comes to. I have taken the Dean estate as the principal instance, because that appears to be the principal instance of profit; but that is not the only instance, or the only instance of profit—it is a salient instance. A *cestui que* trust has a right, when his fund has been dealt with in an illegitimate manner as regards the true legal construction of the bequest, to say at his option whether he will have a decree for the restoration of the fund with or without interest in the meantime, or whether he will take the result of the employment of that fund, when it has been employed together with other funds in a payment resulting in an acquisition of profits, by taking a share of those profits. The remedy is given to him in either case, on account of the impossibility when funds have been mixed, of attributing to each a particular property and earmarking it as belonging to the one rather than the other. And although you may say at such and such a time the Dean estate in particular could not have been bought with this particular fund because these bonds were not then gathered in and collected, still the interest had been gathered in and the interest had been applied, as Mr Macpherson says, in case of the other funds to some extent—(he says they were sometimes in excess and sometimes in deficiency; at all events, at certain times they were)—in excess. It was one common fund, and the *cestui que* trust does not now ask to have his part of that fund followed and pursued and to have his trust-moneys divided from the rest, but he asks what common justice seems to require, namely, that he should have a right to participate in that which has followed from the use of his money—together with the other moneys taking his share out of that joint and common stock. I think the *cestui que* trust has a right to do that.

My Lords, I will only add to what my noble and learned friend has said, that in this decision I think we are in no way departing from—on the contrary, it approves itself to my mind as a way of carrying into full effect—the rule which is common in cases of this kind, namely, that a *cestui qui* trust whose funds have been dealt with without his consent has a right to take the result of that dealing in the manner most favourable to himself. I think therefore, my Lords, that the order suggested by my noble and learned friend is the correct order for us to make.

LORD GORDON—My Lords, in regard to the first question raised under this appeal, viz., Whether the ministers of Edinburgh are entitled to participate in the administration of the Alex-

ander mortification, I entertain no doubt at all. The terms of the deed of mortification are quite distinct and unambiguous. It nominates and appoints the "Right Honourable the Lord Provost and Bailies and Council of Edinburgh, and their successors in office, for the community thereof, and ministers of the said burgh, present and to come," to be the sole and undoubted patrons of the mortification. The ministers of the burgh "present and to come" are appointed, equally with the Lord Provost, Bailies, and Council, and their successors in office, patrons of the mortification, and I entertain no doubt that the ministers were entitled from the institution of the mortification to participate in its administration.

But it is said, that as the ministers have not taken part in the administration of the mortification from its institution in or prior to the year 1700, they have now lost their right to participate in the management. I think this is a mistake. I agree with the Lord President that "the circumstances that the ministers of Edinburgh have never claimed to be conjoined in this administration is of no consequence. No persons of an official character can give away the rights of their successors in office under a trust of this kind, and therefore the trust must be constituted and administered now as provided by the truster in his deed of mortification."

I think that the cases of *Baird and Others v. The Magistrates of Dundee* and *Leslie v. Black*, which were relied on by the appellants, are inapplicable to the circumstances of the present case. In *Baird v. The Magistrates of Dundee*, March 3, 1863, 1 Macph. (H.L.) 6, the mortification was in favour of the Provost and Bailies of Dundee, but from the institution of the trust in 1645 the affairs of the mortification were managed, not by the Provost and Bailies alone, but by the Provost, Bailies, and Town Council. And it was decided by this House in 1863 (2 Paterson's Appeals, 1156), when the question was raised, "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." The case of *Leslie v.*

Black, 6th June 1814, F.C., did not come to your Lordships' House. But the point decided by that case was that where a minister and members of a kirk-session, who were appointed along with others as patrons of a mortification, had for more than a century voted collectively as one person in the administration of the trust affairs, they were not entitled to vote *per capita*, but must continue to vote as they had formerly done. In both of these cases the question was in regard to the intention of the testator, and the usage was only important as showing the contemporaneous interpretation put on the terms of the deed of mortification accepted and acted on for long periods of time. But there is nothing in these cases to indicate that in a case such as the present where there is a clear and distinct nomination of certain official persons to act as patrons, the failure for a length of time of these officials to perform their functions would deprive their successors of the right so distinctly conferred upon them.

The remaining part of the case in regard to the mixing of the funds of the Alexander mortification with those of the Trinity Hospital, and the proper mode of the separation of these funds, is attended with more difficulty. But on a careful consideration of the whole matter I have come to be of opinion that the result arrived at by the Court of Session is right. I have had an opportunity of perusing and considering the judgment which has just been delivered by my noble and learned friend Lord Blackburn, and as his Lordship has gone fully into that part of the case, and as I concur in the views which he has expressed, I shall not detain the House by entering on details.

I am of opinion on the whole matter that the judgments of the Court below are right, and that they should be affirmed.

Interlocutors appealed from affirmed, and appeal dismissed with costs.

Counsel for Appellants—G. E. Kay—M'Laren.
Agents—J. & J. Graham, Solicitors.

Counsel for Respondents—Lord Advocate (Watson)—Nicolson. Agent—T. B. Simson, Crown Agent.