20 Vic. cap. 93, sec. 6, by James Boyd, factor and commissioner for the trustees of the late Robert Steel of Browncastle and Burnhouse, against a deliverance of the Commissioners of Supply of the county of Lanark refusing to enrol him as a Commissioner on the ground of "want of statutory qualification." It was not disputed that the trustees were infeft in lands yielding the requisite amount of rent or value, nor that Boyd was their duly appointed factor.

In support of his appeal the claimant founded on section 19 of the Valuation of Lands Act (17 and 18 Vic. cap. 91), which, *inter alia*, enacted that "the factor of any proprietor or proprietors infeft, either in liferent or in fee, unburdened as aforesaid, in lands and heritages within such county of the yearly rent or value, in terms of this Act, of eight hundred pounds, shall be qualified to act as a Commissioner of Supply in the absence of such proprietor or proprietors."

By section 42 of the above statute the word "factor" was defined to mean "a person acting under a probative factory and commission for the proprietor or proprietors, including corporations being proprietors, for whom he is factor, and in the *bona fide* actual management as such factor of the lands and heritages belonging to such proprietor."

A previous case raising the same question (not reported), viz., *Darling* v. *The Commissioners of Supply of Lanarkshire*, decided by the Lord Ordinary on the Bills (Ormidale) on January 14, 1870, was quoted for the appellant. In that case there was a claim to be enrolled either as a proprietor in the sense of the Act *qua* trustee, or alternatively as factor for the trustees. The Commissioners pleaded (1) that the claimant was not entered proprietor as required on the valuation roll; (2) that there was no qualification as proprietor *qua* trustee under the 19th and 42d sections of the Act 17 and 18 Vic. cap. 91; (3) that the claimant was only one of a body of trustees, and could not come forward in a representative character for himself and the others; (4) that if the trustees were not entitled to be enrolled neither was their factor.

In that case the Lord Ordinary, on 14th January 1870, pronounced an interlocutor finding that the appellant was entitled to be enrolled as a Commissioner of Supply, as factor, to act in the absence of the trustees, and to that extent and effect altered the deliverance appealed from. He added the following note:—

"*Note.*—It was not disputed that the trustees of the late William Darling are infeft in lands and heritages within the county of Lanark of the requisite amount of rent or value, nor was it disputed that the appellant is their factor. In this state of matters it appears to the Lord Ordinary that according to the true construction of sections 19 and 42 of the Lands Valuation (Scotland) Act, looked at together, the appellant must be held to be qualified, as the factor of Darling's trustees, to be a Commissioner of Supply to act in their absence. In any other view the mention of trustees in section 42 of the Act would be without an object or meaning.

"It also appears to the Lord Ordinary that having regard to the terms of the statute, which expressly declares that a factor in the position of Mr Darling 'is qualified to act,' not merely as the proxy of some other party, but 'as a Commissioner of Supply' in the absence of such other party, the appellant is entitled to be put on the roll of Commissioners 'as factor for the trustees of the late William Darling.' The Lord Ordinary cannot see how his being so entered on the roll of Commissioners of Supply can do any harm, while he can quite understand that it may tend to obviate much inconvenience and trouble to all concerned.

"The appellant in this case also claimed to be enrolled as one of the late William Darling's trustees, but the Lord Ordinary has not found it necessary to determine whether such a claim is good in itself or not, as he is clear that the appellant is not entitled to be entered in that capacity and also as factor for Mr Darling's trustees; and it was stated for him that he was not to be understood as maintaining that he was."

Following that authority, the Lord Ordinary in the present case, on 19th December 1876, found the appellant entitled to be enrolled "as factor for the trustees of the late Robert Steele, to act in their absence," and to this extent and effect sustained the appeal and altered the deliverance.

Counsel for Appellant—Alison. Agent—R. A. Brown, L.A.

Counsel for Respondents—J. P. B. Robertson. Agents—Morton, Neilson, & Smart, W.S.

HOUSE OF LORDS.

Friday, March 23.

UNIVERSITY OF ABERDEEN *v.* TOWN COUNCIL OF ABERDEEN.

(Before Lord Chancellor (Cairns), Lord Hatherley, Lord O'Hagan, Lord Blackburn, and Lord Gordon.)

(*Ante*, vol. xiii. p. 677.)

Trust—Breach of Trust—Misapplication of Trust Property, and Operation of Prescription as a Bar to redress.

By deeds of mortification certain sums were assigned to the Town Council of a burgh upon trust for the benefit of professorships in a University. The Town Council invested the money in land, which was conveyed to their "Master of Mortifications," a municipal functionary, and his successors in office, for behoof of the beneficiaries. Thereafter the "Master of Mortifications," instructed by the Town Council, sold the land for a yearly feu-duty. The purchaser, who was in fact an agent of the Town Council, surrendered the property to them, and they were infeft upon it. Soon afterwards the Town Council, upon a representation that they were proprietors of the ground, obtained from the Crown a grant of the salmon fishings in the sea opposite the lands purchased. By these means the Town Council largely enhanced its own property and income, but restricted the beneficiaries to the feu-duty.

In an action of declarator, &c., brought more than forty years afterwards by the University, with concurrence of two professors, *Held* (aff. judgment of Court of Session) (1) (*a*) that the Magistrates were trustees for the University under the mortifications, that the sale was a nullity and unprotected by prescription, and (*b*) that the fishings were subject to the trust; and (2) that the cause should be remitted back to the Court of Session to consider the question of retrospective accounting and liability for arrears.

This was an appeal from a decision of the First Division. The University of Aberdeen and the Professors raised an action of declarator and reduction, founded chiefly on an alleged breach of trust committed by the Town Council of Aberdeen under the form of a pretended sale of certain trust funds set apart for their benefit between 1613 and 1627. These funds were invested in the lands of Torrie, which in 1785 were exposed to sale, and purchased by one David Morrice, who offered the upset price, being an annual rent of £50 for the whole subjects. Morrice afterwards declared that he had purchased them for the Town Council, and the Council forthwith entered into possession. In 1801, on the strength of their being owners of the lands, they obtained from the Crown a grant of the salmon fishings in the sea adjoining. The value of the land and the salmon fisheries had risen to a rental of £170 for the land and about £700 for the fisheries. They had accounted only for £50 to the University. Redress was sought against this breach of trust, and two of the Professors sued for arrears of salary appertaining to their chairs as having been unjustly kept back.

The First Division—partly reversing Lord Young's interlocutor—held that the Town Council had illegally disposed of the subjects and diverted them from the University, and were now bound to hold them subject to the original trusts; that the Council were also bound to hold the salmon fisheries on the same trusts; and that Dr Pirie and Mr Cruickshank, or his representatives (they being the two Professors who joined for their personal interest in the same action), were entitled to a share of the profits and revenues corresponding to their respective tenures of the professorships, which had extended to about thirty years.

At delivering judgment—

Lord Chancellor—My Lords,—Your Lordships having heard the argument addressed to us desired time to consider this case further—not, I venture to think, from any doubt you entertained as to the conclusion at which you should arrive upon, at all events, the main question involved in it, but in order that you might be better able to dispose of a subsidiary question which was raised, and I think raised for the first time by the argument at your Lordships' bar.

The action, which was raised in the Court of Session against the Aberdeen Town Council, was an action which had both declaratory and petitory conclusions. So far as the declaratory conclusions were concerned, the nature of the case may be very shortly described. The principal officers of the Corporation of Aberdeen, whom I will call for brevity the Town Council of Aberdeen, were the trustees of certain mortified funds which were intended to be applied for the maintenance of two Professors in the Aberdeen University. These funds were laid out with others in the purchase of certain property in the neighbourhood of Aberdeen, to the south of it, and lying along the sea coast. Of that property, so far as it represented the mortified funds, the Town Council were undoubtedly trustees for the University and its Professors. A considerable time ago—about the end of the last or commencement of the present century—a transaction occurred, the nature of which may be described in this way: A considerable part of the property having been feued off by the Town Council to various persons, one portion of the property—that adjacent to the sea coast—remained in their hands; and as to it, what I would call little else than a ceremony was gone through, by which they professed to sell it to a gentleman, who immediately afterwards declared that he had bought it as and held it as a trustee for the Town Council. The result therefore was this—that the Town Council being, as we should say, the trustee of a charity land, went through the form of selling that charity land to the Corporation itself, feuing the land which was capable of producing an uncertain sum of profit for the certain sum of £50 a-year. Very shortly after that occurrence this took place—The Town Council thus having become the owners of this land, applied to the Crown to grant to the Town Council as the proprietors of the land the right of salmon fishing in the sea *ex adverso* to the land in question; and they based their application upon a narrative which described that the Town Council had acquired this land for, among other purposes, the purpose of asking for the right of salmon fishing from the Crown; that the Crown was in the habit of giving the right of salmon fishing to the proprietors of adjacent or riparian land; and that they supplicated the favour of the Crown as the owners of the adjacent land. Accordingly, and following the practice of the time, an Exchequer grant was made by the Crown of the salmon fishing *ex adverso* of nearly the whole, though not quite the whole, of the coast to which I have referred.

From that statement of the case—on which I do not enlarge at greater length because it was fully described in the able judgment of the Lord President—I think your Lordships could have no doubt that the case is one which does not admit of argument. The acquirement of the land is a transaction which could not for a moment be maintained in any Court. It is a dealing with trust property by a trustee. The feuing out of the land counts for nothing as against those who are beneficiaries of the trust. They are entitled to disregard it, and treat it as if it never had happened. Then, again, with regard to the salmon fishings, it is one of the first principles—founded upon no technical rule of law, but upon the highest principles of morality—that wherever a trustee, being ostensibly the owner of a property, acquires any benefit as owner of that property, that benefit cannot be retained by himself, but must be surrendered for the advantage of those who are beneficiaries under the trust. Now, it is perfectly apparent that this right of salmon fishing was claimed by the Town Council because they were the owners of the land; it is perfectly

apparent that it was granted to the Town Council because they were the owners of the land; it is perfectly apparent that it would not have been granted to them if they had not been the owners; and under these circumstances it appears to me clear to demonstration that their reception of the grant of the salmon fishings is exactly one of those benefits which came to them as owners of the land, and must be surrendered for the advantage of those who really are the persons interested in the land. I do not delay your Lordships longer on that part of the case. I agree with every word which fell from the Lord President in describing the case, and I do not really think that the very able counsel who appeared at your Lordships' bar on behalf of the Town Council were otherwise than impressed with the difficulty of the case they had to offer.

But, then, there remain the petitory conclusions of the summons. These are conclusions in which the two professors, for whose advantage these funds were mortified—or, rather, I should say one of the Professors and the representatives of the other, who has died—claim in their own persons to have an accounting and payment of the real value of the lands and of the salmon-fishings, over and above the feu-duty which has been paid. With regard to these petitory conclusions, one of the questions—and, as it seems to me, only one—was really argued in the Court below. It was doubted whether the Professors could join in this suit for the purpose of maintaining these petitory conclusions, and the Court of Session held that they could so join; and I own it seems to me that no real or substantial reason can be alleged to show why they could not join. With regard to the practice of this country, your Lordships are well aware that it is an everyday occurrence to find an information dealing with a charity filed by the Attorney-General as representing the charity, and coupled with that—the whole proceeding being styled an information—a bill is filed by the individuals connected with the charity who conceive that they have some claim to personal and pecuniary advantages from the charity. In principle it seems to me that exactly the same thing is done in the present case. In Scotland, where it is not the habit for the Lord Advocate to sue as the Attorney-General does in this country with regard to charities, the University may be taken as representing the general claim on behalf of the charity, and the Professors joining in the petitory conclusions as representing the individuals who ask for the specific relief to which they are entitled. Therefore, so far as the Court of Session held that these petitory conclusions were rightly joined, I think your Lordships will be disposed to agree with that view.

But then there is also pressed upon your Lordships this further view of the case:—Here is an accounting directly for the profits of this land and fishing asked for, and there is no limit assigned to it beyond the Scotch limit of prescription, which is forty years; and it was said that if the petitory conclusions were granted it might involve great hardships. Here is a public body, the Town Council, and whatever may be said of the conduct of those who were the authors of this transaction in the first instance, their successors are not affected by any personal culpability as to what took place, and they have been dealing from year to year with the property of the Town Council on the footing of this transaction. It may be that they have spent the money honestly, thinking they had a right to do so,—it may be that there is no property in the Town Council to answer to the judgment which may be given against it in reference to the arrears; and it may be that the result will be that the members of the municipality and the community generally will have to be taxed to make good money which was spent—not by them, but by those who went before them. I do not find that any argument upon this subject took place in the Court below. I do not find any reference to it upon the condescendence or pleas. I do not find even in the pleadings or in the reasons of appeal before your Lordships' House that any specific reference is made to the subject, There is no doubt that in England there have been cases where, upon reclamations made for the recovery of charity property which has been improperly applied, some consideration has been shown in the decree with regard to the past expenditure of the charity money; and there have been cases in which the accounting of the charity funds, of back rents or back receipts, has been limited—sometimes to the period when first misappropriation was challenged, and sometimes to the filing of the bill for the recovery of the charity estate. I do not find, as far as I have been able to investigate the subject, that there are any authorities—and none were cited at the bar—in Scotch law on this subject; and I do not wish to indicate any opinion whatever as to whether the doctrine, which, in the way I have described, has prevailed in England, has ever been extended, or ought to be extended, to Scotland. But I think—certainly it was your Lordships' feeling — that it ought, it might be desirable, without in any way prejudicing this question, or in any way using expressions which would indicate that your Lordships had any opinion formed on the subject one way or the other—that this matter shall if possible be left open for the further consideration of the Court of Session, in case it might appear to the Court of Session, on their attention being specifically brought to bear on this point, that any modification in the general accounting should be made in view of the considerations to which I have adverted.

Any mode your Lordships adopt for effecting this purpose ought not, in my opinion, to effect in any way the cost of the litigation in this House. It appears to me that the appeal, on the grounds on which it is brought, has entirely failed; and I should submit that the interlocutor of the Lords of Session should be affirmed, with costs; but, in order that the Court of Session may have the opportunity of having their attention drawn to the question of the accounting, I should propose to your Lordships, in affirming the interlocutor of the First Division with costs, to remit to the Court of Session with directions, before proceeding with the accounting order, to allow the appellants to amend the record and the pleas with reference to the question of the liability in the accounting; to allow the respondents to make such alterations in their pleas as may be rendered necessary by those made by the appellants, and thereafter to proceed further in

the case as shall be just; with power to dispose of all questions of expense incurred under this ruling. My Lords, I move your Lordships' accordingly.

Lord Hatherley—My Lords, with the exception of the last part of this case, as to which the noble and learned Lord on the woolsack has proposed that there should be a remit to the Court below, there really could not be entertained any doubt whatever, as soon as the facts were disclosed in the opening address of counsel. The Corporation of Aberdeen appear to have been trustees for certain endowed professorships of certain funds which were placed within their control for that purpose, just as in this country many corporate bodies, notably the Corporation of London, are trustees for many great public charities, holding funds entirely distinct for that purpose. The Corporation of Aberdeen appears to have the proper officer to take charge of these funds, who is called the Master of Mortifications, and in him the property purchased with the sums of money granted by endowment were invested. In process of time it seemed to be thought desirable to dispose of some of the property, and other parts remained on hand. The portion remaining on hand was dealt with in this way:—The corporation, *qua* municipal corporation, fixed an upset price and settled all the arrangements for a sale, and when the forms of selling were gone through a person was appointed to bid on their behalf, and the whole matter was reduced to a mere matter of book-keeping on the part of the corporation. They handed over the property from their Master of Mortifications to the Treasurer, fixing him with the payment of a certain sum yearly for the tenure of the property. That could not possibly be legal. There is, I think, no difference between the law of Scotland and the law of England in this respect. The law rests on the broadest principles of justice, and it is well settled that a person who holds a fiduciary position cannot acquire an interest of any description in the trust-estate until he has entirely denuded himself from the trust, and placed himself at arm's length with those whose interests he once represented. Therefore, as regards the first and main portion of the case, there can be no doubt.

A subordinate question then arises as to whether or not the fishings, being acquired subsequent to the purchase made, as alleged, out of the municipal funds, could not be held independently of any principle that might be applicable to the general bulk of the property. Something might be said for that, and two cases were cited which seemed to have some degree of bearing on the one before us till all the facts were carefully weighed. But when you come to look at the representations made to the Crown, it is distinctly seen that the very object of obtaining the trust property was to have from the Crown a grant of these fisheries, because the Crown had laid down for itself the principle that they would make these grants to persons holding the lands adjacent to the sea. It was as owners of the trust property that the fisheries were given to the council, and the two cases cited at the hearing have no bearing on the case we have now to decide. It was supposed from the special facts of the two cases cited that a distinction had been drawn, taking them out of the general rule that a trustee cannot possibly derive any benefit from the property he holds in trust. But I am sure that the judges in these cases did not mean to impugn the general principle I have mentioned, and their ruling could not be applied to a case in which clearly, and from the very statements of the parties, the benefit derived from the administration of the fisheries has been entirely derived from the acquisition of the trust property, which was obtained for the purpose. The case is one of the simplest and plainest ever brought before us for decision.

The other part of the case would have afforded me some difficulty, for, in truth, we are very little provided with materials with regard to back accounting. We have not had before us any argument on that point before the learned Judges in the Court below. We have not had the point raised in any way clearly or distinctly on the pleadings before us, and I think the course proposed by the noble and learned Lord on the woolsack the only one well competent for your Lordships to adopt in all the circumstances of the case. As to the main portion of the case, I never could have the slightest doubt.

Lord O'Hagan—I am in favour of affirming the interlocutor of the Court below in the manner proposed by the Lord Chancellor. I agree with your Lordships who have already spoken, that there is no room for doubt in the first part of the case. A trust estate is in question. The appellants are the trustees, the respondents the beneficiaries. The predecessors of the appellants administered their trust faithfully until 1797, when the officer called the Master of Mortifications, who acted for them in the administration of the trust-estate, conveyed the lands, in consideration of a feu-duty of £50 a year, to their own treasurer, after a sale at which their own provost presided. Ever since the appellants have kept the property and enjoyed advantages accruing from that possession. A simple statement of the facts of this strange and indefensible transaction is sufficient to stamp it with illegality. The principle forbidding a trustee to traffic in his trusts, belongs to the jurisprudence of all nations. In this case the law of Scotland, equally with the law of England, condemns the abuse of the fiduciary position, and declares that the advantage wrongfully gained by the trustees shall accrue—not to his benefit, but to that of the beneficiaries. It is urged that, whatever may have been the original weakness of the appellants' position, lapse of time has given it validity. But the trust was express. It was broken by the trustees for their own benefit, and to the injury of the *cestui qui* trust, and there is no principle in the law of Scotland which allows any lapse of time to validate a transaction so illegal. These were the opinions of the Court below, and your Lordships will have no hesitation in adopting their judgment.

The ruling of the first point seems to rule the second, and if the lands are affected by the trust—so as notwithstanding the nominal transfer of title and the great lapse of time, to belong still to the beneficiaries—the fishings appear to me to be affected in the same way, and with a like result. It is plain from the statement of the case that the lands were unlawfully purchased by the

trustees for the purpose of founding a claim for the fishings. The possession of land was made the ground of the claim, and was admitted as such by the Crown, and without the land, so acquired by breach of trust, no grant of the fishing would have been obtained. It is true the fishings were granted by the Crown, and that the Crown is not seeking on the ground of misrepresentation to rescind the grant. But if the grant was plainly and avowedly made because of the possession of land giving rights to the beneficiaries, but no right to the trustees to whom the land was unlawfully ceded, why should not the restoration of the land to its true owners involve the restoration of the fishings which the trustees managed to obtain on false representations? The practice of the Crown would have given these fishings to the *cestui qui* trust as the proprietors of the adjacent land, and not to the trustees, who had virtually no interest, corporate or personal, in the matter. And if your Lordships should agree in holding that lapse of time does not alter the rights of these persons, and that what belonged to the *cestui qui* trust in 1801 now belongs to their successors, then the fishings should be held subject to the trust of the mortifications, as well as the land in virtue of which the possession of these fishings was manifestly granted. It would, in my opinion, be a reproach to the law if it were powerless in such a case to prevent a trustee from making a commodity of his own wrong, and holding property claimed only by gross breach of duty. Your Lordships, I trust, will again enforce the doctrine which a distinguished Scotch judge, once a member of this House, laid down, that "The law will even presume that the trustee intended that the profits should go the beneficiary, rather than presume that he intended his own aggrandisement, at the risk and expense of the beneficiary."—(Lord Colonsay in *Laird* v. *Laird*, May 28th 1858, 20 D. 981). It is plain that the judgment of the Court below should be affirmed. As to the petitory conclusions, for the reasons given by the Lord Chancellor I think the course he has proposed is a wise one.

Lord Blackburn—I also am of opinion that on the main question the judgment of the Court below ought to be affirmed. On that I will say no more than that I think the reasoning given in the clear judgment of the Lord President is quite irresistible.

On the minor and petitory question, as to what extent the accounting should go over, I agree with the noble Lord on the woolsack that it has hardly been properly raised on the record. The hardship is on one side very obvious, for this fluctuating body, the Town Council, being called upon to pay forty years' arrears, is to make the occupiers of heritable property in Aberdeen in 1877 pay for the money which has been spent by their predecessors in 1837 and downwards. It is also obvious that it would be a hardship, on the other hand, if the Professors and their representatives, who ought to have their money, lose it because they did not know they ought to have it. I do not think that question has been properly raised and considered, and it is very desirable that any rule of law to be adopted should be ascertained and considered by the Scotch judges; and I therefore entirely agree with the course suggested by the Lord Chancellor, which, as I understand it, is to leave the Court of Session at liberty to consider the question, and to adopt what, after considering the principles of Scotch law and the decisions in Scotland—if there be any—shall seem to them to be the just course.

Lord Gordon—It is unnecessary for me to detain your Lordships with many observations in a case so fully explained in the Court below. I quite adopt the views which were there expressed by the Lord President in reference to the principles which ought to govern both branches of this case. I am happy to say that your Lordships, in adopting the same view, are acting quite in accordance with the principles of Scotch law. In fact, our law is founded upon the civil law, which has adopted to the full extent the restriction upon any dealings on the part of trustees with trust property. The petitory conclusions may admit of some further discussion, and I think an indulgence is conceded to the appellants in this case in allowing them the opportunity of raising on this part of the case a fuller argument than they have yet prepared. It would have been a mistake for your Lordships to have dealt with that part of the case on the very meagre arguments which have been submitted to you. I therefore think your Lordships are acting correctly in giving power to the Court below to allow amendment of the record, and to decide any question of accounting.

Appeal dismissed with costs, and interlocutor appealed against affirmed except as regarded the question of the liability to account, which was remitted back to the Court of Session in the terms of the concluding part of the Lord Chancellor's speech, given above.

Counsel for Appellants (Defenders)—Lord Advocate (Watson)—Cotton, Q.C.—Keir. Agents—Martin & Leslie—T. J. Gordon, W.S.

Counsel for Respondents (Pursuers)—Southgate, Q.C.—Asher—W. A. Hunter. Agents—William Robertson—John Carment, S.S.C.

COURT OF SESSION.

Friday, June 1.

FIRST DIVISION.

[Lord Rutherfurd Clark.

KERR, ANDERSON, & CO. *v.* LANG.

River—Right-of-Way—Property.

Held that the proprietor of lands bounded by a public navigable river, over whose property there existed a prescriptive right-of-way in dangerous proximity to the river, could not be required, in terms of the 384th section of the Glasgow Police Act (29 and 30 Vic. cap. 273), as the proprietor of a subject appearing to be dangerous, to fence the path from the river, in respect that the river, which