[19*th March*, 1846.]

The FEOFFEES OF TRUST and GOVERNORS OF GEORGE HERIOT'S HOSPITAL, *Appellants*.

WILLIAM ROSS and ANDREW FERGUSON, his *Tutor ad litem*, *Respondents*.

Trust.—Damages.—It is not competent to award, out of a charity fund, compensation to a party entitled to the benefit of the charity, in respect of his having been deprived of that benefit by the erroneous acts of the trustees for administering the charity.

THE respondent brought an action of declarator and damages against the appellants, setting forth that George Heriot, jeweller to James VI., had by his will in 1623, bequeathed certain property to "the Provost, Bailiffs, Ministers, "and ordinary Councell," for the time being, of the town of Edinburgh, for founding an hospital for the maintenance and education of "so manie poore fatherlesse boyes freemene's "sonnes of that town of Edinburgh," as the yearly income of what he gave would amount to; the hospital to be erected and governed, and the children ordered, taught, and guided, in such manner as should be appointed by himself, or by Doctor Balcanquall, after his death; that Doctor Balcanquall, in virtue of the powers given to him by the will, enacted certain statutes for carrying the intentions of the founder of the hospital into effect, whereby it was declared, that the governors should admit into the hospital as many poor scholars as the revenue would admit, who should all be children of burgesses and freemen of the burgh, not well and sufficiently able to maintain them; the scholars not to be admitted until they were seven years of age, nor to remain after they were sixteen years of age; to receive an education in reading and writing

Scotch distinctly, and the Latin rudiments; and to be either sent to college and maintained there for four years, or to be bound out apprentices to trades, according as they should be like to prove hopeful scholars or not; and to have while in the hospital, certain yearly allowances from its revenues; the election into the hospital to be by a plurality of suffrages; that the respondent's father was a burgess and freeman of the town of Edinburgh, and died in the full exercise of all the privileges appertaining to these characters; that in 1835, there occurred 20 vacancies in the hospital; that the respondent's mother made an application for admission of the respondent to the charity; that at a meeting of the governors in April, 1835, they filled up the whole of the vacancies by admitting 20 boys to the charity, many of whose fathers were in life at the time, and did not belong to any of the corporations, and were not freemen of the town of Edinburgh, and rejected the application of the respondent; that upon the respondent's application being refused by a majority of the governors, Dr. Lee, one of the governors, dissented, and maintained that the respondent had a right to be preferred to many others who had been elected, and protested accordingly; that in the month of October, 1836, 12 vacancies occurred, when the respondent's mother again applied on his behalf, but the governors refused to allowthe application to be included in the list of applications, against which William Dick protested; that in consequence of this refusal, another application was presented to the governors, praying them to review their decision, and elect and admit the respondent to the benefit of the charity; that at the next election in October, 1836, the respondent's application was again refused by a majority of the governors; and the whole of the vacancies were filled up by the election of boys, several of whose fathers were in life at the time, and whose circumstances and situation did not bring them within the description of persons pointed out as the objects of the charity, or at least, did not afford them so good a claim to

be admitted as the appellant—all which the governors did, in a total disregard of the will of the founder; that the governors of the hospital had illegally and improperly, and in the face of the will and the statutes, refused to admit the respondent to the benefit of the institution, in consequence of which he had suffered great loss and damage. That the appellants had been incorporated by Act of Parliament, and could either sue or be sued. Upon this narrative the summons contained several declaratory and petitory conclusions in regard to the respondent's admission to the charity, and then continued thus:—" And farther, in respect the pursuer has, in consequence " of the repeated refusals of his said applications to be admitted " to the benefit of the said institution, as before mentioned, " suffered great hardship, loss, and damage, and his prospects " in life have been seriously injured, the feoffees of trust, and " governors foresaid, defenders, ought and should be decerned " and ordained, by decree of the said Lords, to make payment " to the pursuer of the sum of 500*l.* sterling, or such other sum, " less or more, as the said Lords shall find in the course of the " process to follow hereon to be due to him in name of damages " he has already sustained, or which he may yet sustain, by " and through the conduct of the defenders, in refusing to " admit and receive him into the said hospital, and of his having " been denied the benefits and privileges thereof, notwithstand-" ing his repeated applications to the said governors, as before " set forth."

The respondents pleaded a variety of defences, in which they admitted that the appellant was a poor fatherless boy, the son of a burgess and freeman, but denied the jurisdiction of the Court to review their proceedings, and insisted that they were entitled to exercise and had exercised a sound discretion in rejecting the appellant in favour of more clamant cases of poverty, although the fathers of the applicants were alive; but they did not question the competency of the action in the form

in which the conclusion which has been quoted, was directed against them.

The Lord Ordinary (*Moncrieff*) pronounced the following interlocutor:—" Finds, with reference to the first or declaratory " conclusion of the summons, that, at the dates of the several " applications of the pursuer, and his mother, for his being " admitted into the benefits of the hospital, he, the said pursuer, " as being admitted, or not denied, to be a poor fatherless boy, " and the son of a burgess and freeman of the town of Edin- " burgh, above the age of seven, was possessed of all the " qualifications required, either by the will of the founder, " George Heriot, or by the statutes of Dr. Balcanquall, to " render him eligible as a scholar to be admitted into the " benefits of the said hospital: finds, that by the express terms " of the said will, the said pursuer, as being a fatherless boy, " belonged to that class of persons for whom the charity was " specially constituted, and that the statutes of Dr. Balcanquall " must be construed with reference to, and in consistency with " that, as the first and fundamental purpose of the institution: " and finds, that, by the Act of Parliament passed on the 14th " July, 1836, it is expressly provided, that a preference shall " always given in the election, first, to the kinsmen of George " Heriot, 'and *second,* to poor *fatherless* boys, sons of burgesses " 'and freemen:' Finds nothing relevantly alleged in this " record, for establishing that the pursuer was not duly qualified " to be put in nomination for being elected into the benefits " of the said hospital: and finds it admitted, that on both the " occasions when he was rejected, there were numerous vacan- " cies, which were not supplied by the election of fatherless " boys, the sons of burgesses freemen: but, in respect that, by " the nature of the foundation, and the express terms of all the " statutes, the sole power of appointment, or election, is abso- " lutely vested in the governors for the time, finds, that it is " not competent for this Court to find that they were bound

" to appoint or elect the pursuer, or any other particular " individual, or to ordain them to admit him into the benefits " of the hospital: and finds, that no *jus quæsitum* can be held " to have been vested in the pursuer, merely by his possessing " all the qualifications necessary for his being so elected and " admitted: finds, that this is not a competent process for trying " authoritatively, any question concerning supposed abuses in " the management of the hospital, or how far the governors " may have been in error in their system of management, or in " the exercise of their discretion: therefore sustains the second " defence pleaded for the defenders; assoilzies them accordingly, " and decerns."

The respondent reclaimed only against that part of this interlocutor which denied the jurisdiction of the Court, and the competency of the action, but before his reclaiming note was advised he had reached the age beyond which, upon any construction of the will of the founder and the statutes of the charity, he could not be admitted to its benefit. The Court required the opinions of all the Judges, and thereafter pronounced the following interlocutor:—

" In respect of the opinions of the majority of the whole " Judges, alter the findings of the interlocutor of the Lord " Ordinary reclaimed against by the pursuer, William Ross; " and, in respect of the other findings in the said interlocutor " now final in this cause, find that the pursuer, being a poor " fatherless boy, and son of a burgess and freeman of the town " of Edinburgh, was fully eligible to be elected a scholar and " admitted to the other benefits of the said hospital, when " he applied to the Governors thereof for that purpose, and " ought to have been preferred, elected, and admitted by them " accordingly, in terms of his applications for that effect: find " that it is competent for this Court to declare that the " governors of the hospital were bound to appoint or elect the " pursuer on the occasions libelled, in the circumstances and

"state of the facts and of the law, as finally fixed by the "findings in the Lord Ordinary's interlocutor: find that this is "a competent process in which to try any alleged error or abuse "in the management, so far as the rights and interests of the "pursuer, as ascertained by the interlocutor of the Lord Ordi-"nary, were affected thereby; therefore repel the second defence "as now pleaded in this cause: find that, on the grounds "stated, the governors of the hospital were bound to appoint or "elect the pursuer on the occasions libelled: but, in respect "that the pursuer is now past the age at which he can be "admitted into the benefit of the said institution, according to "the laws and constitutions thereof, find that decree cannot "now be pronounced, decerning and ordaining the governors "to admit and receive the pursuer as if he were still under "age; therefore, with these findings, remit the case back to the "Lord Ordinary to hear parties on the conclusions of the "summons for reparation or damages, and to dispose thereof as "may be consistent with the above findings, reserving all "questions of expenses."

The appeal was taken against those parts of the Lord Ordinary's interlocutor which were adverse to the appellants, and also against the interlocutor of the Court. The appeal was founded and fully argued upon the different grounds of defence which had been maintained in the Court below, but at the hearing, an additional defence was, for the first time, raised and argued, which, in the view taken of the case by the House, it is alone necessary to notice. That defence was, that as the respondent could not now be admitted to the hospital, the only conclusion of the summons under which any relief could be given was that for damages; but as it was not so framed as to be personal against the appellants, but was against them in their corporate capacity only, no decree could be made upon it, seeing it was not competent to award damages which could be satisfied only out of the funds of the charity.

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Mr. Solicitor-General and *Mr. Anderson* for the Appellants.—It is admitted that the respondent is beyond the age at which, in any view of the will and statutes, he could be admitted to the benefit of the charity. The only relief, therefore, which he can ask under his summons, supposing the grounds he has urged in support of it to be well founded, is compensation in damages for the injury he has sustained by being deprived of the benefit of the charity. If his rejection was authorized by the will and statutes, there is plainly an end of any such claim; the act of the appellants was sanctioned by the founder, and could not be complained of. On the other hand, if the rejection was not authorized by the will and statutes, the act was one for which the appellants, having no authority for it, were personally responsible. Had they, therefore, compensated the respondent out of the funds of the charity, they would have committed a breach of trust, for there is no provision in the will or statutes permitting application of the funds to the repair of damage, which the trustees may have occasioned by acts done in an erroneous administration of the trust. If it was not competent for the appellants *ex proprio motu* to make such an application of the charity funds, it was equally incompetent for the Court to order it by their decree. The principle of the decision of this House in Duncan *v.* Findlater, *Mc L. & Rob.* 911, is directly applicable to the present case, and as the summons does not contain any *personal* conclusion for damages against the appellants, the only relief which, on the authority of that case, the respondent could have asked; there was nothing which remained to be worked out by the action, and the Court should therefore have dismissed it.

Mr. Turner and *Mr. Bennett* for the Respondent.—The case did not come before the Court below, and was not decided by it upon the question of damages. The Lord Ordinary had found that the action was not competently framed for trying a

question of breach of trust, and the Court differing in opinion from him as to the competency of the form of the action, remitted to him to decide the question on its merits, but that decision was never given; the question of damages, therefore, is not competently before the House. But if it were, the Lord Ordinary's findings in regard to the rights of the respondent, ascertained everything in his favour which could give him a right to damages. These findings were not reclaimed against by the appellants; they acquiesced in the interlocutor generally, and all that the respondent reclaimed against was that part of the interlocutor which denied the competency of the action, and this, therefore, is all that was before the Court. In Union Canal Company *v* Carmichael, 1 *Bell* 316, it was no doubt held that the reclaiming note brought the whole cause before the Court, but there the prayer of the note was general; here it is limited expressly to the finding as to the competency of the action. The other findings not reclaimed against are irreversible here or in the Court below; and as they establish what must necessarily result in a decree for damages, the Court would have been justified, had the proceedings been allowed to reach that stage, in giving such a decree.

With regard to the question raised at the bar, for the first time, as to the competency of awarding damages out of the trust fund, the only authority cited against it is the case of Duncan *v.* Findlater, *Mc L. & Rob.* 911, but that case was materially different in its circumstances, and cannot rule the present; there the party complaining was a stranger to the fund out of which the damages were sought to be made effectual; here, according to the final findings of the Court below, the respondent is ascertained to be a party who had an interest in the fund, who was entitled to have been preferred before others for the relief which the fund was intended to afford. It is not, therefore, a misappropriation of the trust fund to apply it for his indemnification, and this may be done by the trustees not

electing another boy until the indemnification is made. The case is somewhat analogous to those which are of frequent occurrence in Chancery, where persons are complained of as having been erroneously admitted to the benefit of a charity. The Court, while it declares the error, does not disturb the party in the enjoyment of the benefit he has so erroneously obtained. It refrains from acting, and so sanctions the continuance of what originated in a breach of trust, and yet it does so for the sake of a party not entitled to the benefit of the trust. Here, if the respondent's indemnification is allowed out of the fund, it will be in favour of a party who was entitled to the benefit of the charity, but has been erroneously deprived of it. The case is also somewhat analogous to those where trustees have acted erroneously in the discharge of the trust, but have done so in conformity with established acts of their predecessors. In these cases the Court, although it declares the breach of trust, allows the trustees their costs out of the fund, which is *pro tanto* a diversion of the funds from the use intended by the founder of the charity.

The counsel for the appellants were not called on to reply.

LORD COTTENHAM.—My Lords, several questions of considerable importance and interest have been discussed at the bar connected with this charity. But it appears to me that there is one point upon which it becomes the duty of this House to dispose of the case, without any further proceedings—not thinking it necessary to hear any observations in reply to the case made on the part of the respondent. And it is one, undoubtedly, of very great importance, as affecting the general course of proceeding in Scotland, as connected with charities or trust funds.

The pursuer here complains of having been improperly rejected, that is to say, that he, being qualified, and claiming

the right to be admitted into this charity, was improperly rejected. But it appears that if he were capable of establishing his right so to have been elected at the time, at the present moment he cannot have any remedy connected with that right of being admitted, inasmuch as he has now passed the age at which, by the rules of the charity, boys can be admitted.

He then goes on, and in his summons prays for the payment of damages as some compensation for the injury he has sustained from his having been, as he alleges, improperly rejected. He sues, not the individual trustees, not those by whose personal act the alleged injury may have been sustained, but he sues, in their corporate capacity, the trustees of the charity. He does not, as I find by the summons, pray that his damages may be paid out of the trust fund; but the summons is so constituted that he could not get any damages except out of the trust fund; and, in fact, it has been understood during the whole proceedings, that if there are to be any damages at all, they must be paid out of the trust fund.

Now, my Lords, assuming the whole of the pursuer's case, as far as relates to his eligibility and to the injury that he has sustained by not having been elected at the time when he proposed himself as a candidate for the vacancy which then existed; the point that strikes me is, that according to the facts as admitted on both sides, the question resolves itself into a question of damages. He can have nothing except it be in the shape of damages, and he can have damages only out of the trust fund. The question, therefore, comes simply to this, whether by the law of Scotland a party who complains of improper conduct on the part of those who have the management or trusteeship of any charity or trust fund, can obtain compensation, for an injury which he is supposed to have sustained, out of the fund in the management of those individuals?

Now it is quite obvious that it would be a direct violation,

in all cases, of the purpose of the creator of any gift, or benefit, or charity, to provide out of the charity fund for the payment of damages from the improper acts of those who have the management of the fund. If any case exist where this would not be the effect, it is certainly not the present. The fund being devoted to the purpose of charity, trustees are interposed for the better management and appropriation of this fund. The author of the gift, the creator of the charity, intended that the officers of the charity should have the fund confided to them, and he looked only to the trustees for the proper management and performance of the purposes of the trust. Whereas, to give damages out of the fund would not be a purpose which the founder had in view, but would be a direct violation of the purpose for which the fund was intended.

My Lords, this question came incidentally, (because it was not made a prominent feature of the case,) under the consideration of this House, in the case of Duncan and Findlater; and this House was very much struck to find that such a course of proceeding as I have suggested, had been adopted in Scotland. Although there had been no decision as to the right, yet it was stated, and I have no doubt accurately, that such a practice had crept into the administration of trust funds in Scotland. And the opinion of those noble Lords who attended that discussion, was expressed in disapprobation of any such practice. And observations were made which one would have supposed would have led to a very deliberate consideration in the Court of Session, as to whether such a practice was justifiable by the law of Scotland, or I might say, by the law of any other civilized country. It is true that the date of the summons in this case, appears to be anterior to the case of Duncan and Findlater, which would account for the parties not having taken up that question, in a mode which would naturally have been expected if the proceedings had been subsequent to the decision of the House in that case. But that

does not at all explain to me how in the subsequent proceedings in this case, this point appears to have been so entirely overlooked.

I observe, however, that one, and but one, of the learned Judges seems to have had his attention very much directed to this, I mean *Lord Mackenzie*. He thus expresses himself: "I "may, however add, that in any view, I should have had "difficulty in giving an opinion that damages were due, either "by the parties who rejected the pursuer personally, or out of "the funds of the institution. The latter is not I think asked." Yes, it is beyond all question asked, because the only damages to be paid under this summons, must be out of the trust fund. Then he goes on to say this: "And I should have great "difficulty indeed to adopt it, for I do not think it is in the "power of the governors to cause such an application of the "funds by any act of theirs."

No doubt Lord Mackenzie took a very correct view of what was the duty of the trustees, and how inconsistent with that duty it would have been for the Court to direct the application of the trust fund, to pay damages occasioned by the improper act of those who had the conduct and management of this fund.

Mr. Turner has referred to a practice which certainly has in some cases existed in this country, and which he considers has tended, at least, to some justification of this mode of proceeding in Scotland. Now, my Lords, it is perfectly true that in some cases, where great hardship would be done by too rigidly enforcing the application of a trust, the Court of Chancery, where application has been made to it, has *abstained* from exercising its jurisdiction to the prejudice of particular individuals, who would otherwise have been turned out of the charity of which they supposed themselves to be proper objects, and of which they had been admitted members. But that is a very different thing, from the Court *actively* interfering and directing a breach of trust, if it be a breach of trust so to apply the trust fund. I

think counsel will in vain search for any precedent in this country, in which the Court has said: we will direct the trustees to apply the funds to purposes for which they were not intended, and are declared not to be so intended by the author of the gift. In the cases referred to, the Court, merely out of compassion to those who would otherwise have been reduced to the greatest distress and difficulty, by the enforcing of obedience, has abstained from interfering; and so has, in some instances, undoubtedly protected those who were benefited by an application of the trust fund, which the Court did not think justified by the trust itself. I believe the learned counsel did next refer to the course of proceeding nearest approximating to the present, although it is very far indeed from sanctioning the course of proceeding which has been adopted here. There are cases in which trustees incur costs, and where it is the first object of the trust to indemnify the trustees. If the costs are properly incurred by them, to reimburse them, is not a misapplication of the trust fund. If the other party is wrong, the Court directs him to pay costs. But cases occur in which the trustees ought to have the costs out of the estate, although the litigation was improperly occasioned. Occasionally, the party who pursues the litigation, is either not competent to pay costs, or is not in law liable to pay costs. Suppose, for instance, if it be possible to suppose such a case as the Attorney-General filing informations without a relator, then, to be sure, the trustees cannot get their costs, there is no relator, and they are not in default, but are improperly brought into litigation, and costs are incurred. Beyond all doubt, the Court would then give them their costs out of the trust fund; there being no other means by which they could be reimbursed, their reimbursement being the first trust to be executed. But the question here is, are damages to be paid out of the trust fund, to the prejudice undoubtedly of others, whoever they may be, who would be entitled to the benefits of this trust fund, if it were not so diverted.

Now, my Lords, finding that there is no decided authority in the law of Scotland upon this subject, finding that it would be directly in breach of the trust under which these funds are held; it does appear to me to be the duty of this House again to discountenance any such practice, if it has existed in Scotland, and to decide this case upon a ground so very clear, and so very free from doubt, as this point appears to be.

Some difficulty was supposed to exist from the findings of the Lord Ordinary not having been the subject of a reclaiming note. I do not find it very clearly explained, nor can I, from reading the opinion of the learned Judges, at all satisfy my own mind how that created so much difficulty in their view of the case. But in the view I take of the case, it creates no difficulty at all; because it appears that these findings are very innocent findings, looking at the duty this House has to perform. They go no further than to find the eligibility of the pursuer; because no reasonable doubt can be entertained, nor has any been suggested, that he was a fatherless boy, a proper object of the charity; and the only question has been, whether in respect of these qualifications he was entitled to admission, at all events, before others who had not those qualifications. Under the circumstances that now exist upon a question of damages out of the trust fund, whether the pursuer was or was not more qualified than the Lord Ordinary found him to be, is quite immaterial; because whatever his right or title may have been, if he cannot get damages out of the trust fund, he can get no compensation at all. I do not find, therefore, any difficulty whatever as to that point, and that relieves the case from some embarrassment as to some part of the argument contended for at the bar. I leave these findings where they are. But then it is said, that not having been the subject of a reclaiming note, and yet having been brought here by appeal, a conflict between two Acts of Parliament makes it doubtful how far this is competent. It does not appear necessary for this House to interfere in that

question, for it does not at all touch the ground upon which the decision will turn. The Lord Ordinary grounds his decision upon certain points, which were in that part of the interlocutor which was the subject of the reclaiming note; and these it does not appear that this House need at all interfere with, because in the view I take of the case, whether the Lord Ordinary was right as to the ground upon which he passed his judgment in favour of the defender or not; there was another ground which appears to me unanswerable, which must have led to the same conclusion. Whether, therefore, the Lord Ordinary was right in that part of the finding which was the subject of the reclaiming note, appears to me not necessary for this House to determine. It is quite sufficient for this House in lieu of that finding, to substitute the finding, that inasmuch as this pursuer under the summons could only claim damages to be paid out of the trust fund, this House is of opinion, that the claim could not have been sustained, and therefore the defenders are entitled to be assoilzied.

Lord Brougham.—My Lords, I take entirely the same view of the case as my noble and learned friend. It is quite true, as was stated by one of the learned Judges,—*Lord Mackenzie*, I think,—that it does not appear that this claim is in terms directed against the fund of Heriot's Hospital Trust. It is so. But it can mean nothing else. The summons really means nothing else. For your Lordships will observe there is a careful suppression of the names of individuals, A. B. and C. D., feoffees in trust and governors of the hospital. If they were named, it would not make any difference; but they are not even named. Search the summons from the beginning to the end, and you do not discover, except by probability, who these feoffees in trust are. And this probability arises from what appears of the history of the charity, from the 13th of July, 1627, to the time of Dr. Balcanquhal,

who had been commissioned by the founder to take certain steps for making statutes at that time. The Provost, Baillies, Ministers, and Ordinary Council at Edinburgh, were then the feoffees, and trust guardians, and governors of the hospital. Consequently, it was a body of a very odd kind, of a very various aspect; for it comprises the whole of the Magistrates of Edinburgh, and the whole of the Ministers of Edinburgh. And that I take to be the constitution of the charity now. I take it for granted, therefore, that the parties are proceeded against as the feoffees of trust and governors of the hospital, and only in their *quasi*-corporate capacity.

Then they are said to have acted by a majority of their number in this case; and the thing complained of is done, not by the whole body of a meeting, but by a majority of their number, having authority to bind the minority as in all corporations; but not having power to bind the minority to the extent of making them liable for the tortious acts done by the majority against which acts the minority are stated in the summons to have actually protested; for Dr. John Lee differed from his colleagues, and protested against their proceeding. Therefore, what we are called upon to do, most clearly is nothing else than to give a compensation in damages, if there be any due at all, not against the wrong-doers for their tortious acts, not against those who committed the injury out of which *damnum* arose to this party, William Ross, but against the whole corporate body, (against Dr. Lee among the rest,) which means against the fund, for it cannot be out of the fund of the ministers of Edinburgh, it cannot be out of the fund of the town council, "the common good" as it is called of the corporation of Edinburgh, it is against no such fund, but it is the trust fund alone that can be gone against, and which alone was in the contemplation of the summons, and of the Court, namely, the fund of Heriot's Hospital, whereof these respondents are officially the trustees.

Now, my Lords, the charge against them, upon which this extraordinary claim for compensation out of the fund of the hospital is made, is this, that the governors of the said hospital have illegally and improperly, and in the face of the will and the statutes before referred to, done the act in question; so that the charge is neither more nor less than this modest charge: that because the trustees have illegally and improperly violated their trust, that is to say, violated the statutes under which they hold their office as trustees, therefore what? not that they themselves, the wrong-doers, should pay for having violated the trust, and in the face of the will and statutes done the tortious acts, and committed the injury out of which damage arose to the party complaining: no such thing; but that the fund should be answerable, and that out of that trust fund this compensation should be given for the wrong committed upon Ross, by the misfeasance of the trustees.

My Lords, I do not think it is possible to conceive a much more absurd and untenable proposition: it is making one party, namely, those who are interested in Heriot's Hospital, either the persons now actually upon the books, or the community for whose good the fund was established, for whom the hospital was founded and endowed, it is making them suffer, and the fund suffer, because the trustees of that fund are alleged to have done an injury in breach of their trust; it is making those who might have been the plaintiffs, if any one had thought fit to charge the trustees with having done wrong in their office of trustees, it is making them pay, because another party has been injured, namely, Ross; according to that, two parties having a right to complain, namely, the community or the parties interested in the hospital, and this one individual; the object is to obtain, at the expense of one of those parties, compensation for an injury done to the other. I do not think that absurdity, (I speak it with all possible respect,) could go much further than this would go, if it were to be established.

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My Lords, the practical part of the interlocutor is this claim of damages; that is the only matter that remains in the case, because, suppose the Court to have been perfectly right in finding that the preference ought to have been given to the fatherless boy, not only that he was eligible, for I do not deny that he was, I agree entirely with the Judges that he was, but supposing them also to be right in finding, (which I do not think they were,) that he ought to have been elected without more, and therefore negativing the positive discretion given the trustees within certain limits as to qualification; supposing the Court to have been perfectly right in finding that this boy ought to have been elected, and that if another vacancy arose, (which they clearly meant by their finding, because there was no vacancy then,) he should positively be elected, but for his age having become too great, so as to deprive him of his qualification; I say, supposing they were right in that, (which I think they were not,) still I should totally differ from them in coming to the conclusion, for the reasons assigned, that, therefore, damages ought to be paid out of the trust fund, for the wrong done to him.

I am clearly of opinion, that this finding was wrong, and that the interlocutor must, therefore, be reversed; and it is only necessary for that purpose to go to one part of it—that which respects his age being too great, which takes away all the practical application of the matter. I am clearly of opinion, that the only practical matter being erroneously found, viz., that damages are payable from the trust fund, it ought to be reversed,—that being the case we have no occasion to add much more.

My Lords, as far as regards the interlocutor which was reclaimed against to the Inner House, I really do not find occasion to quarrel with any one part of its findings, except the latter part, which is now before us in the reclaiming note; I do not quite agree with the reasons there given: I do not think it is quite correct to say, without qualification, that the trustees have an absolute right and discretion vested in them, unless it be

understood, (and I think, to avoid misconstruction, it ought to have been added by the Lord Ordinary, I can have no doubt that he meant that,) that they only have a right within certain limits, that is to say, that they have a right to exercise an absolute discretion in choosing qualified members; I think that is the real candid construction to put upon it, but it has the appearance of being a little stronger and a little more unqualified; I therefore entirely agree with the course pointed out by my noble and learned friend, which is to reverse this interlocutor, and to make such an alteration as my noble and learned friend has proposed in that part of the Lord Ordinary's decision.

My Lords, I cannot help concurring with my noble and learned friend; I am sorry I feel the necessity of so doing, but it is my duty to do it, in order to prevent the misapplication of doctrines, and the continuance of erroneous decisions. I cannot help joining with my noble and learned friend, who has already addressed your Lordships, in expressing my regret that, although the summons, it is true, was issued before the decision in the case of Duncan and Findlater, in 1839, yet that decision having authoritatively laid down the law upon the matter, which I cannot well distinguish from the present, the Court did not pay some attention to that decision, and that, in fact, it seems to have been much left out of sight by the learned Judges in their opinions. In all the arguments to-day, and in all these proceedings, I can see no reference to the important authority of this House setting right the law, or rather setting right the practice; It is said that the law then laid down for the first time, was new. There was no authority cited in that case to show that it was new; and I am quite sure, if it was for the first time laid down, it was so perfectly clear upon all principle and analogy, and upon every view of common sense that could be taken of the matter, that it was rightly so laid down for the first time; but I have no recollection of any case having been then brought before us, to show us that we were then laying

down new law. I have reason however to believe, that opinions existed in Scotland, though without the sanction of text writers, and without the higher sanction of decided cases, that such was the liability of a trust fund, that it could be called upon. I think it would have been better if more attention had been paid to the decision in Duncan *v.* Findlater, and to the high authority of that case, than appears to me in this case, to have been paid to it.

LORD CAMPBELL.—I am of opinion that on the 14th of February, 1843, when the interlocutor appealed against was pronounced, the Court ought to have dismissed this action. It is admitted, that at that time no benefit could arise to the pursuer, unless he could be indemnified by the recovery of damages; and the Inner House remitted it to the Lord Ordinary, for the purpose, as I conceive, of assessing the amount of the damages; but they must have been of opinion when they pronounced this interlocutor in February, 1843, that damages in the manner prayed by the summons might be recovered.

Now, my Lords, I cannot help expressing my great astonishment that such a notion should prevail for one instant among the Scotch Judges; they seem to have thought that if charity trustees are guilty of a breach of trust, persons who are damnified by that breach of trust, are to be indemnified out of the trust fund: that is a doctrine which they lay down, reducing it into an abstract form, that if charity trustees are guilty of a breach of trust, persons who suffer from that breach of trust are to be indemnified out of the trust fund.

My Lords, that is certainly contrary to all reason and justice and common sense; it is a clear perversion of the intention of the donor, and it would lead to the most inconvenient consequences; the trustees in this manner would be indemnified ior their own misconduct, and the real object of the charity, the ntention of the founder, as to the objects of his favour, would

be entirely and completely frustrated. If there has been a wrong committed by the charity trustees—if there has been a junction of *damnum cum injuriâ*, an action may be maintained against the members, even of a trust. I believe it was held in the Auchterarder case, that the Ministers of the Presbytery of Auchterarder, who disobeyed the mandate of this House, were liable to an action for damages, for their disobedience. But if there had been any funds belonging to the Presbytery, those funds would not have been liable, the damages were to be paid out of the pockets of the wrong-doers.

My Lords, a doctrine so strange requires to be supported by very high authority. Now I have the greatest respect for the law of Scotland; I think that it has been framed by men of very great learning and wisdom, and it would astonish me very much if there had been any authority to support a doctrine so absurd; but not a fraction of authority has been produced—not a shred of authority has been produced to support this; there has been no institutional writer cited, no decision has been cited, but only reference made to an understanding.

My Lords, I believe that this understanding is of very recent origin in Scotland, and that it probably arose from certain cases to which reference has been made, where an accident happened from the misconduct of persons repairing a highway, and there being a general compassion felt, and the case being pitiable, the party received a sum of money out of the trust fund; there was no one to find fault with that, it met with general approbation, and so the practice became general throughout the country, and from that origin arose this supposed doctrine, that in all cases where trustees are guilty of a breach of duty, the damage is to be made good out of the trust fund.

That doctrine was fully examined in the case of Duncan and Findlater, to which reference has been made: I had the honour, at that time, to plead the case at the bar; I heard it

decided in a manner that, I believe, gave universal satisfaction to all who heard it. The doctrine was entirely scouted, I may say, and I should have thought, that after that decision, we should have heard no more of it for all time to come. But, however, the prejudice that had been ingrafted in the minds of some learned persons, does not appear to be entirely eradicated, and a general notion among some of them still prevails, that this doctrine may be applied to all cases of charity. Now that doctrine is contrary to all reason, and sense, and justice; it is wholly unsupported by any authority; and I think we may safely say, it is entirely contrary to the law of Scotland; if that be so, then the damages which the pursuer claims out of the funds of Heriot's Hospital he cannot obtain; and if he cannot obtain damages in the manner that he has asked, then he can derive no benefit whatever from this action, and the action ought to have been dismissed. Upon this ground I think we must reverse the interlocutor and pronounce now that judgment which ought to have been pronounced in February, 1843, by the Court below.

Lord Cottenham.—As a means of carrying out what appears to be the opinion of the House, I would propose to reverse the interlocutor of the Court of Session, and to vary the interlocutor of the Lord Ordinary in this way; after the word "respect," to leave out the words that follow, and to introduce these in their place: "but in respect that the pursuer's case is "under the circumstances reduced to a question of damages, "and the only damages that could have been recovered by the "pursuer, if any, would have been to be paid out of the trust "fund, for which the trust fund cannot be liable."

It is ordered and adjudged, That the said interlocutors of the Lords of Session of the Second Division, of the 15th (signed 16th) of November, 1842, and of the 14th (signed 15th) of February, 1843, complained

of in the said appeal, be and the same are hereby reversed; and that the said interlocutor of the Lord Ordinary, so far complained of, in the said appeal, be varied, by leaving out the following words, viz.: "by "the nature of the foundation, and the express terms of all the "statutes, the sole power of appointment or election, is absolutely "vested in the governors for the time; finds that it is not competent "for this Court to find that they were bound to appoint or elect the "pursuer, or any other particular individual, or to ordain them to "admit him into the benefits of the hospital; and finds, that no "*jus quæsitum* can be held to have been vested in the pursuer, merely "by his possessing all the qualifications necessary for his being so "elected and admitted; finds that this is not a competent process for "trying authoritatively any question concerning supposed abuses in "the management of the hospital, or how far the governors may have "been in error in their system of management, or in the exercise of "their discretion. Therefore, sustains the second defence pleaded for "the defenders," and substituting the following words: "But in "respect, that the pursuer's case was under the circumstances reduced "to a question of damages, and that the only damages, if any, which "could be recovered by the pursuer, would be to be paid out of the "trust funds, to which such funds were not in any respect liable: "Therefore assoilzies the defenders accordingly."

Spottiswoode and Robertson—Dunn and Dobie, Agents.