

FEBRUARY 15, 1864.

MARY ANNE CLEPHANE and Others, *Appellants*, v. THE MAGISTRATES AND TOWN COUNCIL OF EDINBURGH, *Respondents*.

THE MAGISTRATES OF EDINBURGH, *Appellants*, v. WILLIAM FORRESTER and Others, *Respondents*.

Trust—Church—Hospital—Charter—Usage—Railway Act—Compensation—Application of Money by Trustees—*Trinity College Church, originally a monastic institution founded in 1462, having become the property of the Crown, was granted in 1567 to the Corporation of Edinburgh, as trustees for the Trinity Hospital. It had been used soon after and ever since by the inhabitants of the neighbourhood as a parish church, the inmates of the hospital not requiring the whole accommodation. In 1846 the North British Railway Act passed, and contained a section providing, that the company should not make the railway (which was to be made upon the site of the church) until they had agreed with the Corporation on a plan for the removal and rebuilding of the church on some neighbouring site in the same style and model; but it should be competent to the company to pay a sum as compensation in lieu of the foregoing obligation. The company paid £17,000 as compensation, and the church was taken for the use of the railway.*

HELD (reversing judgment), *That, having regard to the ancient usage under the charter, there had been a dedication of the building to the use of the neighbouring parishioners as a parish church, concurrently with its use as a church by the inmates of the hospital.*

HELD (reversing judgment), 2. *That the Corporation was not bound to rebuild the church in the same style and model as the original church, but it was sufficient to expend part of the sum (£7000) in building another church containing similar accommodation, and to be used as a parish church; the surplus of the price to be applied to the maintenance of the charity.*¹

In 1642 Mary of Gueldres, Queen of Scotland and relict of King James II., founded and endowed in Edinburgh a college or collegiate church and hospital of the Holy Trinity. This college or church and hospital had a provost, eight prebendaries or priests, and two choristers, besides thirteen poor persons, commonly called beidmen, who were maintained therein. Various lands and revenues were assigned in the charter for the maintenance of the church and hospital, which were separate subjects.

These benefactions were afterwards confirmed by a charter from the Bishop of St. Andrews, dated 1st August 1462. The college or collegiate church and hospital continued on the same footing till the Reformation in 1560, when, along with the other church lands and benefices, they fell to the Crown. The Magistrates of Edinburgh, anxious to obtain a share of them for the support of the reformed clergy, and to establish schools and hospitals, made various applications to the Crown, and, in particular, they presented a petition to Queen Mary praying for a grant of “ye situation quhar ye blak friers war, togidder with zair yards, to beig ane hospitale upoun for ye pour, and als caus som dress be maid, yat we may have ye place, kirk, chalmeris, and houses of ye Kirk of Feld, to beig ane scule, we satisfiand raisonable yairfore; and als yat zour Grace wil gif and dispone to us for sustening of ye hospitale and scule forsaid ye annuellis of chaplanries and freris, being presentlie in your Grace’s handis, and ye remanent of the samin quhen yai sall pertene to zoure Grace, and becaus owre said town is populous, and the multitude yairof greit.”

These appeals resulted in their obtaining from Queen Mary a charter, dated 16th March 1562, in which her Majesty granted to them a piece of ground and orchard that formerly belonged to the Blackfriars, for the purpose of erecting an hospital on it. The place, however, did not suit,—a charter or dispensation was obtained from Regent Moray in 1566, dispensing with the condition annexed to the charter of Queen Mary—that of building an hospital within a certain time, and allowing the magistrates to retain the gift, or to sell it; but it was declared, that the profits and feu duties, and, in the event of a sale, the price, were to go to the maintenance of the Trinity Hospital, and for no other purpose. Down to 1567, however, the Trinity Hospital and Church founded by Mary of Gueldres remained in the possession of the Crown.

On 10th November 1567 Sir Simon Preston of Craigmillar, then Provost of Edinburgh,

¹ See previous report 22 D. 1222: 32 Sc. Jur. 569. S. C. 4 Macq. Ap. 603: 2 Macph. H. L. 8; 36 Sc. Jur. 325.

obtained from Regent Moray a gift of the Trinity College Church, houses, biggings, yards, &c., belonging thereto, "to be biggit and upheld by the good town and the eleemosinars to be placed thereinto by the Provost, Bailies, and Town Council for the time being;" and he then transferred and made it over to the Magistrates, who thereupon named one of the bailies to be master of work to the hospital.

On 12th November thereafter (1567), a charter was expedite in name of King James VI., with consent of the Regent and the Lords of the Privy Council, in favour of the Provost, Magistrates, Town Council, and community of the city, whereby they conveyed the Collegiate Church and Hospital of the Trinity to them. This charter proceeded on the narrative of being moved by a desire to assist "such poor and impotent persons as may stand in need of assistance, so that they may not perish and die through extreme hunger, penury, and want of necessary sustenance;" and on the understanding, that Sir Simon Preston intended to build and endow an hospital for the above purposes.

The charter reserved the right of patronage belonging to the provost and prebendaries of the College Church of the beidmen then placed in the hospital. These reserved rights, however, were afterwards purchased by the Council.

The Magistrates and Council, in virtue of this charter, thereafter took possession of the collegiate church, churchyard, hospital, and various other buildings adjoining, and erected a new hospital thereon, but the church was allowed to remain, and they continued to exist till acquired by the North British Railway Company, after mentioned, in 1846. As this charter, however, only conveyed the old buildings themselves without the revenues, (which consisted of the lands conveyed by Queen Mary's charter of 1562 and other royal grants, remaining in the hands of the provost and prebendaries,) the Magistrates did not obtain possession of these revenues till 1585, when they purchased from the last provost of Trinity Hospital the benefice of the provostry, "with all and sundry kirks, teind sheaves, and other teinds, glebes, manses, orchards, yards, annual rents, donations, and rights of patronage, prebendaries, and other offices belonging to the said provostry, and all other kirks and lands annexed thereto," which the provost resigned into the king's hands for their behoof. This purchase was completed by a charter, dated 3d June 1585, from King James VI., in favour of the Provost, Bailies, and Council of Edinburgh, whereby his Majesty granted, and perpetually mortified, disposed and confirmed, to them and their predecessors, all and whole the benefice of the provostry of the Trinity College Kirk above mentioned, with the patronages, &c., belonging thereto, for the purpose of maintaining the poor and sick within the hospital, and poor scholars within the colleges and schools, &c. The charters and grants before mentioned were confirmed, renewed, and ratified by several other charters, during the reign of King James VI., particularly by a charter of 15th March 1603, in favour of the city, commonly called "The Golden Charter," and by various other charters and Acts of Parliament, down to the year 1636, by which the powers of the Magistrates were considerably increased.

The Magistrates and Council of Edinburgh, in virtue of the titles and charters before mentioned, have, since 1567, possessed and managed the whole property connected with the Trinity Collegiate Church and Hospital; and the revenues and funds thereof have always been kept separate from those of the town as a distinct trust. The benefits derived by the inmates of the hospital from the church consisted principally in their receiving free accommodation therein, and the hospital funds were not charged with the repairing of the church; while, on the other hand, the Magistrates drew the revenues and applied them to the support of the church and minister. In 1584 they divided the city of Edinburgh into four parishes, and the Trinity College Church was allocated by them to one of these; and it has ever since remained one of the city parishes, under the name of Trinity College parish. The right of nomination or patronage of the ministers has also been exercised by them during all that time.

In 1848 the North British Railway Company, being desirous of procuring ground for the purpose of extending their station in Edinburgh, applied to Parliament for an Act to authorize the acquisition of Trinity College, &c. A part of it was in the parish of Trinity College, and on which the Trinity College Church and Hospital were erected. The bill was strenuously opposed in committee by the citizens of Edinburgh, on the ground, that the church was the best and most perfect specimen of the order of architecture to which it belonged, and an object of great archæological interest. The consequence of this opposition was, that in the Act 9 and 10 Vict. c. 74, being that under which the North British Railway Company obtained their powers, a clause was inserted to the effect, that, before the railway could acquire the ground and buildings thereon, they must agree with the Magistrates on a plan for the removal and rebuilding, at the company's expense, of a church of the same style and model in all respects, with equal convenience of access and accommodation, as that then existing; and in the event of any difference the Sheriff of Edinburgh was named arbiter between the parties. This clause authorized the railway company to offer, and the Magistrates were authorized to accept of, a sum in lieu of the obligation imposed on the company.

In carrying out this clause, the parties having differed in regard to the site and plans, applied

to the Sheriff, who approved of a site, and also of certain plans under a report from Mr. Rhind, architect. The railway company and the Magistrates thereafter entered into an arrangement on 4th May 1848, whereby they were relieved from the condition of building the church in the same style by paying to the city the sum of £16,371 9s. 6d., being the estimated cost of the building, besides a sum of £1300 for site, &c., making in all, £17,671 9s. 6d., which sum was accordingly paid to the Magistrates in May 1848. The building occupied as the Trinity Hospital, which stood apart from the church, was sold to the North British Railway Company by the Magistrates and Council, and the price was applied towards the hospital funds; but the above sum of £17,671 9s. 6d., being the price of the church, was not put into these funds, but remained in the hands of the Magistrates. The Trinity College Church was immediately taken down, and the site is now occupied by the North British Railway Company as part of their terminus.

The Lord Provost and Magistrates did not thereafter proceed to erect the church, in consequence of various conflicting views urged in the Council; and after some years' delay, it was resolved in 1856 to apply the whole sum in the erection of the church; but the first action of declarator after mentioned was *then* raised, and in 1858 it was proposed and carried by a majority, (the minority dissenting as after mentioned,) to apply about £7000 in building a new Trinity College Church, which was not to be in the same style and model as the previous one.

In 1856, Mary Ann Reid and Others, members, beneficiaries, and pensioners, entitled to and enjoying the benefits of the Trinity Hospital of Edinburgh, raised the first action of declarator against the Lord Provost, Magistrates, and Town Council of Edinburgh, as trustees or governors of the Trinity Hospital of Edinburgh, and also against the Presbytery of Edinburgh, for any interest they might have, concluding, that it should be declared, that the Trinity College Church and Hospital, with the ground pertaining thereto, was vested in the Magistrates and Council, as trustees and administrators, exclusively for the uses and purposes mentioned in the charter of King James VI., of 12th November 1567, and the subsequent ratifications and confirmations thereof by charters and Acts of Parliament; that the charter of 12th November 1567 was still a subsisting grant; and that the Magistrates and Council were not entitled to apply the property conveyed, or the produce thereof, for any other purposes than those prescribed in the charter; and, in particular, that they were bound to apply the sum of £17,671 9s. 6d., received by them as compensation, and interest, solely for behoof of the Trinity Hospital, and for the building and construction of the same; and that they should be interdicted from applying any part of the money towards the erection of a church to be one of the city churches of Edinburgh.

The pursuers in this action pleaded—(1.) That under the express terms of the charter of 12th November 1567, the Trinity College Church Hospital, and the revenues thereof, were vested in the Magistrates solely for the purposes mentioned therein, which they alleged was solely the support of the hospital and the inmates thereof, and that they were now entitled to apply the sum realized by them from the church for the maintenance and support of the hospital, and not in the erection of a new church; such being a purpose alien to the objects of the grant. (2.) That the Magistrates were not entitled to found upon the usage of the church as one of the city churches for such a number of years, in respect, that they themselves, being the trustees for the hospital, could not found upon the said usage and application which was contrary to the purposes of the charter; they also never having, by any deed or writing, conveyed the property of the church from *them as trustees* for the hospital to the city; that such usage and application was therefore illegal, and only took place by toleration or sufferance.

The *second action* of declarator was brought at the instance of *William Forrester and Others*, the minority of the council dissenting from the proposal to apply £7000 of the money received from the railway company in the erection of a church, and a number of citizens and gentlemen of taste residing in Edinburgh, *against* the majority of the Magistrates and Council, concluding to have it declared, that the £17,671 9s. 6d., received by them under the Act of Parliament and agreement, was held by them in trust for the erection of a new church within the parish of Trinity College, or as near thereto as conveniently might be, with equal convenience of access and accommodation to that which formerly existed, and of the same style and model in all respects; and to prohibit them from building a church of any other description, style, or model, and from employing the funds received in any other way than what was contemplated by the Act. The pursuers contended, that the church contemplated by the Act of Parliament to be erected, and for which the Magistrates and Town Council received the money from the North British Railway Company, was to be one strictly the same in style with that which formerly existed; that the responsibility of erecting it had been transferred from the railway company to the Magistrates and Council, under the arrangement already mentioned; and that the application of only a part of the sum towards the erection of a building not the same in style of architecture and size proposed by the majority of the Council, was contrary to the terms of the Act, and was therefore illegal.

The Court of Session held, (1.) That the beneficiaries of the hospital were not entitled to insist on the money received from the Railway Co. being applied to the hospital; and, (2.) that the Magistrates must expend the whole of the money in erecting a new church in the same style and model.

Clephane's Case.

The *pursuers* in this *case* appealed against the interlocutors, and in their *printed case* stated the following reasons:—1. Because Trinity College Church was held by the respondents and their predecessors in office on the trusts expressed in the charter of 12th November 1567 for the benefit of the hospital. 2. Because the beneficiaries of the hospital have not lost their right by any adverse possession of the community of the city of Edinburgh, and there has been no use or possession of the Trinity College Church which can affect the trusts of the charter or give any different meaning to it from that which the language thereof clearly imports. 3. Because the money received by the respondents from the North British Railway Company as the value, or as compensation for the loss, of the old church, is affected, in the hands of the respondents, with the same trusts as the church itself had been, and because it was no part of the duty of the respondents to devote or appropriate this money in building another church for the parish or district called Trinity College Parish. 4. Because the appellants were entitled to have a decree of declarator in terms of the leading conclusions of their summons. 5. Because the appellants were entitled to interdict in terms of the consequential conclusions of the summons, or, if these conclusions went too far, the Court ought to have granted an interdict to such an extent as the appellants were entitled to, regard being had to the trusts of the charter of 1567; and because, although the appellants were not entitled to this interdict, the Court ought to have made such order as should establish the rights and interests of the beneficiaries and the duties of the trustees, and should secure the due administration of the charity in time to come.

The respondents (the Magistrates of Edinburgh) submitted to the judgment of the House, referring to their reasons for altering the interlocutors, as stated in next case.

Forrester's Case.

In this case the *appellants* (the *Magistrates of Edinburgh*) submitted, that the interlocutors should be reversed or altered, for the following reasons:—1. Because the Act of Parliament 9 and 10 Vict. c. 74 does not impose on the appellants any obligation to expend the money received from the North British Railway Company in the erection of a church of the same style and model as the church formerly and at the date of the said Act existing. 2. That, apart from the said Act of Parliament, there is no ground in law on which any such obligation rests on the appellants. 3. That, assuming that the appellants are under an obligation to expend the money as directed by the interlocutor of 28th June 1860, they are entitled to use their discretion in such expenditure, they always complying with the requirements of the Act of Parliament and of the said interlocutor.

The *respondents* (*Forrester and others*), in their *printed case*, supported the interlocutors for the following reasons:—1. Because, upon a just construction of the Act of Parliament, 9 and 10 Vict. c. 74, the sum received by the appellants from the railway company does not belong absolutely to the Magistrates and Council, but is held by them in trust for the erection of a church within the parish of Trinity College, or as near thereto as conveniently may be, with equal convenience of access and accommodation, and of the same style and model as the church which existed in that parish at and previous to the date of the said Act. 2. Because the sum received by the appellants was received by them on the trust, that the same should be applied in the erection of a church as directed by the said Act. 3. Because it was the right and duty of the Court below to see, that the purposes of the trust were properly and fairly carried out by the appellants, and because, in the interlocutors appealed against, the proper orders were pronounced for carrying these purposes into effect. 4. Because, under the Act of Parliament and the agreement with the railway company, the appellants have not and had not an absolute and uncontrolled discretion as to the selection of a site for the new church, any more than as to the application of the money received from the railway company. 5. Because the interlocutors complained of are in all respects well founded.

Anderson Q.C., and *C. Wotherspoon*, for the appellants Clephane.—The interlocutors of the Lord Ordinary and Inner House were wrong. The trusts under which this church was held were those declared in the charter of 1567, previous to which the property in the church was in the Crown. That was a grant of the College Church as its primary subject for the support of the poor; along with the church were given other subjects, but there is no distinction made between the hospital and the church. The beneficiaries of the charity have not lost their right by adverse possession. It is well settled, that no length of time will avail to sanction a violation of the trust—*Ramsay v. College of St. Andrews*, 4 D. 1366; *Magistrates of Dundee v. Presbytery of Dundee*, ante, p. 1078; 4 Macq. Ap. 228; 33 Sc. Jur. 707; *Baird v. Magistrates of Dundee*, ante, p. 1156; 35 Sc. Jur. 305. It is said the use of the church as a parish' church was an adverse user; but such user was not inconsistent with user by the pensioners, and, so far as it was, it was a breach of trust. The recognition of this misapplication of the church is said to be contained

in a Statute of 1587; but when examined there is no such recognition. Nor is there any recognition by the Court of Session in the case of *Clapperton v. Magistrates of Edinburgh*, 2 D. 1385, which did not decide any question as to the property in the church. The church being, therefore, impressed with certain trusts in the hands of the Magistrates, it follows, that the price or compensation received in lieu of the same is impressed with the same trusts. The sole object of the trust was the benefit of the poor pensioners. The church was their absolute property, and the trustees might have, immediately after the grant of 1567, converted the church into an hospital if it was for the benefit of the charity. The governors of a charity may sell the lands for the benefit of the charity—1 More's Stair, 169, note T. *Primâ facie*, therefore, the price of the church obtained from a railway company would not require to be applied in reproducing the church in its old form; to do so would not be for the interests of the charity. Nor does the language of the Railway Act impose any such mode of applying the money. The whole clause is merely a machinery for ascertaining the price, but the Statute does not deal with the application of the price when obtained. It cannot be for the interest of the charity to waste its funds on fanciful architecture, which is only valuable for some collateral purpose. Therefore the interlocutors of the Court below are wrong in ordering a rebuilding of the church in the same style and model as the old. Even if it be held, that there was a dedication of the church to the use of the neighbouring inhabitants for the purposes of a parish church, the utmost that can be ordered is the building of another church giving similar accommodation but not containing fanciful architecture, and the surplus of the money would then be applicable for the benefit of the charity. The appellants were entitled to interdict in terms of their summons. It was said the interdict sought too large a remedy, by prohibiting the building of any church; but even if it did, the Court ought to have liberally amended the prayer, and treated that part as surplusage. Such is the course of practice in English charity suits—*Attorney General v. Corporation of Rochester*, 5 De G. M. & G. 811; and the law of Scotland is rather more liberal than that of England in favour of charities—*Crichton v. Grierson*, 3 W. S. 336; *Jack v. Burnett*, 5 Bell's Ap. 409; *Magistrates of Dundee v. Morris*, 3 Macq. Ap. 134; *ante*, p. 747; 33 Sc. Jur. 707; *Baird v. Magistrates of Dundee*, *ante*, p. 1156; 35 Sc. Jur. 305.

Rolt Q.C., and *Sir H. Cairns, Q.C.*, for the Lord Provost and Magistrates of Edinburgh.—The Magistrates of Edinburgh are not interested in this litigation except as trustees, and are quite ready to submit to whatever order is made. But they submit, that they are not bound under the Railway Act to rebuild the church in the same style and model as has been ordered by the Court below. That is not the effect of the 8th section of the Act. That section merely makes it obligatory on the Railway Company so to erect the church, if they should undertake to build it at all; but there is no similar obligation thrown on the Magistrates as trustees of the charity. It is obvious the money in their hands would be impressed with the purposes of the trust; but the trust does not require the proceeds to be wholly spent in the rebuilding of the church, stone for stone, as it originally stood. The 8th section was merely a machinery for ascertaining what sum should be paid by the company as a discharge of their obligation, for it was deemed unsafe to trust to the Lands Clauses Act for compensation; but when the sum was once paid, the Statute was *functus officio*, and the proceeds then became merged in the general funds of the Magistrates as trustees. Therefore the interlocutor in Forrester's case was wrong. What then were the trusts on which the Magistrates held the proceeds? They have a discretion as to the kind of church to be built with the proceeds, and it is within such discretion to apply a sum of £7000 to build a church containing similar accommodation to the old church, and to devote the rest of the funds to the uses of the charity, which application of the funds is that which is most consistent with the history and position of the charity. But as to the precise mode of applying the money, the Magistrates are indifferent, and will obey the order of the House.

The Attorney General (Palmer), and *Selwyn Q.C.*, for Forrester.—The grants, coupled with subsequent user, shew a dedication of the church to the uses of the charity and of the inhabitants jointly, but to be used as a church. Therefore, whatever money was to be paid for the church must continue to be impressed with the same trust. But the terms of the 8th section of the Railway Act recognize and confirm this specific appropriation of the money. By that section the Magistrates are bound to apply the whole of the money in reproducing, in the same style, the church as it was originally. The Statute did not deal with the Magistrates as ordinary proprietors, but as trustees bound to maintain the church specifically. Therefore the interlocutor in Forrester's case was right.

LORD CHANCELLOR WESTBURY.—My Lords, I think it desirable to call your Lordship's attention particularly to this case, the circumstances of which I will carefully review, in the hope that not only the grounds of your Lordships' decision may be fully stated and well understood, but also in the hope, which I am almost afraid to entertain, that further litigation in this matter may be prevented.

The case is one of very great simplicity, and to a mind acquainted with the subject, and with the principles which ought to govern the administration of charities, it can present no possible difficulty. The material facts are these: Anterior to the Reformation, and from a foundation

made in the 15th century, there was established in Scotland, immediately without the precincts of the city of Edinburgh, but now, I believe, included within these precincts, a college, or, as we should call it in England, a chantry of priests, to which an alms house or hospital was annexed. It appears that the ecclesiastical part of this eleemosynary foundation consisted of a provost, eight prebendaries, and two choristers. The purely eleemosynary part of it consisted apparently of thirteen beadsmen, poor men. There was attached to the college a church apparently built in a very beautiful manner, and presenting, though imperfect, a fine specimen of the order of architecture according to which it was erected. The church consisted merely of a choir and of what is called in Scotland a cross, or by us more frequently a transept. It was undoubtedly of dimensions far beyond what was required by the priests and by the beadsmen, and therefore it is reasonable to infer, that it afforded accommodation to the neighbouring residents. In this state of things, the Reformation swept over Scotland. The priests were driven out of the place, the beadsmen apparently were permitted to remain there. It would seem, that the church was disused for some time before the grant of the charter of 1567, and part of the hospital appears to have fallen into a state of ruin.

In this condition of things, during the infancy of King James I., the charter of 1567 was granted. It is unnecessary to call your Lordships' attention to that charter in any considerable detail. Your Lordships will find, that, for charitable purposes, a grant is made by King James to Sir Simon Prestoun, who was at that time Provost of the city of Edinburgh, being a grant of the whole of the church called, Collegiate Church of the Trinity, with the churchyard, buildings, and so forth, appertaining thereto, and also the hospital, at that time denominated Trinity Hospital. The whole of this is granted to the Provost and Magistrates of Edinburgh. The purposes of the grant appear to be these: An obligation is thrown upon the Magistrates to rebuild or construct the hospital, and to support the poor and the sick, who were the objects of the charity; and it is provided that the whole of the property so granted shall be devoted to these uses and to none other.

It would seem that the master of the hospital, that is, the superintendent of the poor men, continued to reside in the hospital at the time of the grant; and accordingly we find a contract, that was made between the Magistrates of Edinburgh and the master of the hospital, a person of the name of Robert Pont, which it is material only to advert to for the purpose of pointing out, that Mr. Pont surrendered into the hands of the Crown, for the benefit of the grantees, namely, the Magistrates of Edinburgh, the benefice of Trinity College, and all the things appertaining to it; and that, in consideration of this transfer, the Magistrates paid to Mr. Pont a sum of money, and the Magistrates also contracted to pay Mr. Pont the sum of £160 Scots yearly during his lifetime. I advert to this only for the purpose of pointing out, that it is reasonable to infer, that some money was paid by the Magistrates, probably out of their own funds, for the purposes of this charity.

In that state of things, another grant was made by King James I. to which it is material to refer. It appears to be dated in the month of June 1585. Its materiality as bearing upon the present subject of inquiry lies in the fuller description which it contains of the objects of the hospital. After a more full and ample description of the objects of the grant, it is declared, that it should be taken and held by the Provost and Magistrates of the city *pro sustentatione*, and so forth; for the maintenance of the aged decrepit men, orphans, and poor within the hospital, and poor scholars within the college and schools at all times thereafter. The charter also proceeded to authorize the Magistrates and Council to rebuild the hospital, which was then in a ruinous condition, in a more convenient situation at or near the college.

A little anterior to this particular grant, in the year 1584, the Magistrates appear to have divided the town or city of Edinburgh into four districts or parishes. And your Lordships will find, that on the 14th October 1584, a resolution or order was made by the Town Council, by which the Trinity College Church, that is, the church of this charity, was appropriated for the accommodation of the north east parish or district. I wish particularly, therefore, to point out, that from the very earliest times, and as soon as it could be supposed that the grantees took possession of the subject of the grant, there was a dedication of the collegiate church, so far as it could be applied without prejudice, to the use of the hospital for the accommodation and service of the inhabitants of the district.

Your Lordships will find, from the subsequent charter, that the hospital was rebuilt by the Magistrates of Edinburgh, and then come two important charters of May and July 1587, to which I will for a moment direct attention. The important part of them appears to be a statement by the King in the charter of May 1587, that it shall be lawful for the Provost and Magistrates and their successors to use the old hospital in order that they may be able (it is printed very inaccurately, but your Lordships will be able to make the necessary corrections,) to support the poor within the hospital, which has been recently repaired by them, by means of the rents of the said hospital, in a convenient manner.

Then, in a subsequent charter, your Lordships will find a declaration made, that the grant is for the support of the ministers and the poor, and for the entertainment of the said college, (that,

I suppose, means for the preservation or the maintaining of the said college,) lately erected by them, that is, the Magistrates. Then follows a provision, that the Provost and community, and their successors, shall be bound to support the ministers serving at the churches.

To that may be added an Act of Parliament which was passed in 1592, which also recognizes the position of the Council and Magistrates with respect to the charity.

I have troubled you at this length with these details for the purpose of shewing, that at that time, by an order made in October 1584, the church had been dedicated to the purposes of the district, so far as it was not required for the hospital; that that use of the church which must have been then perfectly well known, is nowhere adverted to as being at variance with the purposes of the charity, and must therefore be taken to be sanctioned and confirmed by the subsequent grants to which I have adverted.

In that state of things, your Lordships will find a further statement which is material, in which it is stated and appears to have been admitted, that Trinity College parish, or Trinity College district, was well known as one of the districts into which the city was divided, and that the building therein used as the church has been constantly treated as if it were the parish church of that district.

Now, from these facts, therefore, I submit to your Lordships, that two conclusions may with propriety be drawn. First, that the permitting Trinity Church to be used as a place of worship for the inhabitants of the district, after reserving full accommodation for the poor and the officers of the hospital, was not a breach of trust, but was perfectly consistent with the purposes of the charitable grant. And secondly, that inasmuch as such user has continued uninterruptedly from the foundation of the charity to the present time, it must be considered, that the maintenance of the church for the use of the hospital and of the inhabitants of the adjoining district is one of the lawful purposes of this charity. These being, as I conceive, just conclusions to draw from the facts to which I have referred, I now pass on to the transactions which have subsequently occurred, and which have given rise to this litigation.

The North British Railway Company was empowered by its Act of Parliament to take for the purposes of its railway and for the purpose of constructing a station for that railway the piece of land on which this collegiate church stood, and of course it was a matter of great importance, that the terms and conditions on which the railway company should be permitted to take this land should be accurately and clearly defined in their Act of Parliament. I desire you to pause for a minute to consider what is the object of one of these Railway Acts of Parliament. The object of an Act of Parliament of that kind is, to define the manner in which the railway company shall be bound to make compensation to the owner of the property taken, but it is not a part of the object of such an Act of Parliament to interfere at all with the title to that property, or to lay down any rule affecting the ownership of the property, or the manner in which the money to be given to the owner of the property shall be employed. To do any such thing would be greatly beyond the proper scope and limits of that description of legislation.

Now, with that general observation, I will beg attention to the clause in the North British Railway Act, which is the 8th section of the 9 and 10 Vict. c. 74, upon the particular language of which a great part of this legislation is founded. And indeed, on the construction proposed to be given to that section, the whole of the second suit brought by Forrester and Others is entirely based. Now, the section (reading it shortly) may be divided into three parts. The first portion of it enables the company to restore and rebuild the church, which they purpose to take down, and, in the event of their doing that, the obligation is carefully imposed upon the company of restoring and rebuilding it exactly as they found it at the time when they took possession of it. And in order to meet any questions that might arise in the course of that operation, a tribunal or arbiter is provided, namely, the Sheriff of Edinburgh, to whom any differences of opinion arising in the course of that operation might be referred. Then the section concludes with an alternative which it is put in the power of the railway company to adopt, namely, that in lieu of the obligation which has been thus carefully described, to rebuild the church themselves, they may give to the Magistrates and Town Council a sum of money as compensation for the church. And by a species of refinement and subtle construction, which I regret that any person has been found to entertain, because it has produced years of litigation, and has been an impediment to the use and application of the money belonging to this charity, it appears to have been thought, that it was possible to construe the clause in such a manner as to attach to the money to be paid by the railway company an obligation of application precisely to the same effect as that which the railway company would have been bound to observe, in the event of their adopting the first alternative of undertaking to restore the church.

I think it impossible that any such ingenious subtlety should receive any kind of acceptance. One of your Lordships (LORD CRANWORTH) suggested what is the true interpretation, as I humbly think, of these words—in lieu of the said obligation, namely, the obligation of restoration, which is described in the first part of the clause. If it be not the alternative embraced by the company, it is still to be the measure of the amount of compensation, so that, in point of fact, the object of the clause is this, that if the company did not undertake to restore the church

actually, they were bound to pay to the Magistrates, as trustees of the charity, such a sum of money as they would have required to expend, if the first alternative had been embraced by them. That is a reasonable interpretation to give to the clause, and it gives a standard of the compensation to be paid.

It appears that practically this was the construction which the parties put upon the clause. For proceedings were taken for the purpose of ascertaining what ought to be done in order to restore the church, and they were prosecuted so far as to enable the referee to determine exactly the sum of money which the railway company would have to expend, if they had entered upon and completed the work of restoration. The railway company very wisely preferred to pay the money, rather than to undertake the duty of seeing to its expenditure, and presiding over the restoration of the church; and that sum of money, which is very considerable, amounting altogether, I think, to £17,000, was actually paid over to the trustees of the hospital in the month of May 1848.

Now that money, when received by the trustees of the hospital, was part of the general funds of the charity, applicable for the purpose of re-instating the church in a reasonable time precisely in the same condition in which it stood at the time, when the church was taken away by the railway company. But it would be ridiculous to suppose for a moment, that it was the object of the Act of Parliament, or that there can be any principle of law or any suggestion of reason or common sense, that would lead the mind to the conclusion, that this money, when received by the Magistrates and Town Council, was received under an obligation to have it expended entirely, or the greater part of it, in the actual reproduction, with all its architectural decorations, of that exact building which was taken by the railway company. It is a lamentable thing, that such a suggestion was ever made; it is as unfounded in law as it has been lamentable in its consequences. I hope your Lordships will not yield the smallest countenance to any such contention, which ought not to have been entertained by any reasonable mind, and which would be utterly repudiated by any one knowing well the principles upon which charities ought to be administered.

This leads at once to the conclusion, that the whole of that suit, instituted by Forrester and others, and which was brought expressly for the purpose of maintaining the proposition, that the whole of the money paid by the railway company should be dedicated to the purpose of an exact reproduction of the original building, is founded upon an entire misconception and erroneous construction of the clause of the Act of Parliament, and, therefore, I have not the smallest hesitation in advising your Lordships, that the whole of the interlocutors in that suit which have been appealed from should be reversed; that the defenders shall be absolved from the conclusions of the summons, and the summons itself be dismissed. I am very sorry to be obliged to add, in consequence of the countenance that has been given to that suit, that I cannot individually advise your Lordships to go further than to dismiss it without expenses.

Then that suit having been cleared away, we come to the consideration of the other suit originally instituted by persons having a direct interest in the charity, as being some of the objects of that charity. To that suit the Magistrates and Town Council of Edinburgh are called as defenders in their capacity of trustees of this hospital; and although there has been a good deal of criticism upon the conclusions of that summons, and although it is true, that some of the conclusions are rather directed to an end that would be inconsistent with the re-erection of a church sufficient for the accommodation of the inhabitants who would resort to the old church, yet I think the conclusions of that summons, fairly construed, especially in a charity case, might well have warranted the Court of Session in taking upon themselves to pronounce in that suit the order which I think common sense and reason imperatively required should be pronounced in some suit or other directed to the end of effecting the proper administration of this charity property, and the proper application of this sum of money which has been allowed to remain so long unappropriated.

Therefore I shall not hesitate to recommend your Lordships to reverse the interlocutors which are appealed from in that suit, and further, I shall recommend your Lordships to make that suit the basis or foundation of an order which I trust, if your Lordships approve of it, will be found to comprehend all the material objects that are now required to be provided for in the hope of securing a just and reasonable administration of the charity.

It is material to observe, that the Magistrates suggested, that a sum of £7000 only was required for the acquisition of a site, and for the erection of a new church of sufficient capacity to provide for the wants of the inmates of the hospital in the enlarged scale on which I hope it will be established, and also for the accommodation of the neighbouring inhabitants. I wish I could add to that what I have looked for with anxiety, a clear and definite expression on the part of the Magistrates of their willingness to have this fund devoted to the purpose of the proper augmentation and re-establishment of this charity after deducting so much as should be required for erecting the new church. But what I have found not so clearly expressed in the pleadings has been supplied by the counsel for the Magistrates at the bar, and I understand from their counsel, that they are quite willing, as it is their duty to be, that the whole of this fund, *minus* the sum

that shall be absolutely required for the rebuilding of the church, shall be at once applied in the augmentation of the charity.

In the hope, therefore, of providing for these ends, which, as I observed during the argument, at the first blush of the thing must have presented themselves as being the clear objects to be attained by a Court of Justice in this case, I have at some length perused the order which I will submit to your Lordships as the proper order to be pronounced under the circumstances of the case. I propose that the order of your Lordships' House in both appeals should run thus: Reverse all the interlocutors in the second suit, that is, the suit by Forrester and Others; assoilzie the defenders from the conclusions of the summons, and dismiss the same, but without expenses; and in the first suit, that of Clephane and Others, reverse the interlocutors appealed from, and declare that, under the circumstances of the case, and having regard to the usage which has uniformly prevailed since the establishment of the charity, it is fit and proper, that so much of the money received by the defenders from the North British Railway Company as will be sufficient for the purpose, but not exceeding £7000, shall be applied to the purchase of a site and in building a church, which, after reserving full accommodation for all the inmates of the Hospital and persons connected therewith, will afford to the inhabitants of the district as much accommodation as was afforded by the collegiate church which has been removed; and declare, that such church ought to be built in connexion with the Hospital, or on a site as near thereto as can be conveniently obtained; and declare, that the duty of building such church belongs to the defenders as trustees of the charity, and that they will not be under any obligation to observe or follow the style or model of the old church in such new building; and declare, that such church will be the property of the charity, subject to its being used, and if so used, then to its being kept in repair, and maintained in like manner as the old church was before its removal by the railway company, and let the defenders forthwith bring in and lodge with the Court below a minute shewing the site and plan of the building of such new church, and the building is not to proceed until such plan and site have been approved of by the Court; and declare, that all the residue of the money received from the railway company, and all interest thereon, and all the rest of the property of the hospital, is applicable to the enlargement and maintenance of the charity as declared and established by the charter of May 1567 and November 1587 according to a scheme to be settled for that purpose (I may say in passing, that the reason in my mind for introducing both charters is this, that your Lordships will find in the charter of November 1587 a rather more full description of the objects of the charity than is contained in the charter of 1567); and refer it to the Court below to settle and approve of such scheme accordingly; and let the Court inquire and ascertain of what the property of the hospital consists, and in what manner the money received from the railway company has been invested by the defenders, and when such investments were made, and what sums have been received for interest thereon, and by whom, and how such sums have been applied; and declare, that the expenses properly incurred by the pursuers and defenders in the suit of Clephane and Others ought to be paid out of the funds of the charity, and let the same be duly taxed and the amounts paid out of such parts of the funds of the charity as the Court of Session shall deem most fit to be applied for that purpose.

I humbly submit to your Lordships, that this order will, as far as we can now foresee, provide for the immediate necessities of the case, and I trust, that there will be found, in carrying this order into effect, a conscientious spirit that shall recognize the religious and moral duty, that rests upon these parties no longer to keep the charity fund in abeyance, but to apply it, as it ought fifteen or sixteen years ago to have been applied, to the purposes of this useful charity.

LORD CRANWORTH.—My Lords, the full manner in which my noble and learned friend has gone through the details of this case, I feel, has absolved me from the necessity of adding more than a single word. In the first place, the long usage since the time of the charter seems to me perfectly to justify this House in saying, that the maintenance of the church as connected with the hospital is one of its legitimate objects. That being so, supposing no Acts of Parliament had passed such as that of the North British Railway Company, but that by lapse of time or by some accident the church had been burnt down or destroyed, what would have been the duty of the trustees? Clearly their duty would have been to rebuild the church, or to build a church with at least as good accommodation as that which existed before. But I take it to be perfectly clear, that there would have been no duty or obligation to rebuild it in the particular ornamental style in which the old building had been constructed. That being so, it is impossible to suppose that the Legislature, in passing a railway Act, meant to alter the trusts which were imposed upon the trustees of adequately discharging the duties connected with this charity. It is impossible, that it could have meant to impose upon them the duty of building a church in any particular style. The reason why that obligation was imposed upon the railway company, if they rebuilt the church, is obvious. Had such an obligation not been imposed upon them, they might have built the church in a very imperfect and improper style. It was to secure the public against that, that this provision was made. But if the alternative was adopted, which any one

looking reasonably at the subject must have known would be adopted, namely, for the company to pay the price or the value instead of rebuilding the church themselves, then, when the money comes into the hands of the trustees, they have no other obligation upon them with reference to that money than would have been imposed upon them, if the church had been in some other way destroyed and then rebuilt out of any funds which they might have in their hands for the purpose of rebuilding it.

I think that the provisions which have been proposed by my noble and learned friend exhaust the subject, and I trust, that they will put an end to this not very creditable litigation, which has now extended over a period of 15 or 16 years, and deprived both the hospital and neighbourhood of the advantages which they have a right to derive from the use of the church.

LORD CHELMSFORD.—My Lords, I concur in the view which has been taken of this case by my two noble and learned friends, and I can state the grounds of my opinion in a very few words. In order to ascertain what was the trust, that attached upon this church, and the consequent obligation upon the Corporation of Edinburgh at the time of the passing of the North British Railway Company's Act, it will only be necessary for me to advert very shortly to the terms of the charter of 1567. Now what was the object of that charter? It is expressed very shortly in the recital to be, "to found and endow a hospital," and for that purpose certain property, including the church in question, called the Collegiate Church of Trinity, was given to the Corporation of Edinburgh for the building and construction of the said hospital, for the maintenance of the poor and sick, to be placed by them thereon for no other use. And there is subsequently given a power to the corporation to dispose of this property as shall seem good, with a qualification, that they shall be bound to apply it to the foresaid use, and no other. Now whether this means, that they were to apply the existing subjects of the grant to the purposes of the hospital, or whether they were entitled to sell the property and apply all the proceeds to that use, it is immaterial to consider. Throughout the whole of this charter, there is nothing to bind the Corporation to maintain this church; there is nothing to shew, that, either as a work of art or for any other reason, it was such an object of interest, that it was considered desirable to preserve it. I apprehend, that, under the words of the charter, it was competent to the Corporation to have applied the building itself, the church, to the purposes of the hospital; and there is nothing whatever to prevent their doing what they did, namely, applying the church to the use for which it was fitted, for the purposes of divine worship. Now originally for about 17 years, the church appears to have been applied exclusively to the use of the hospital, but in 1584 and again in 1625, it was appropriated to one of the parishes into which Edinburgh was divided. Now, whether the Corporation had a right to appropriate this church as a parish church, may perhaps be questioned. But, undoubtedly, as there was sufficient accommodation, not only for inmates of the hospital, but beyond what was necessary for them, it could have been no breach of trust on the part of the Corporation to have allowed the inhabitants of the parish, that is, the inhabitants of the neighbourhood of the hospital, to have sittings in the church. Even if it were objectionable, there were no persons who were likely to object to it, because it seems, that the inmates of the hospital were invariably provided with the sittings, and the other persons, the inhabitants of the parish, paid for the sittings which they occupied, and all the sums received in respect of those payments were applied to the maintenance of the church, and therefore so far the funds of the hospital were relieved.

Thus matters continued from the year 1584 down to the year 1846, and it is perfectly clear, I apprehend, that although the Corporation had applied this church as a parish church, and therefore in some degree had taken it from the hospital, yet, inasmuch as the trusts of the charter are perfectly clear, it was not competent to them to divert that church from the uses to which it was applicable under the charter.

Therefore, in 1846, at the time of the passing of the North British Railway Act, the state of things was this, that the church was applicable to the uses of the hospital, and had to be maintained by the Corporation, and maintained, if you please, to the extent of the use to which it had been applied for so many years, nearly three centuries, namely, for the accommodation beyond the inmates of the hospital of other inhabitants of the neighbourhood. Therefore, as my noble and learned friend (LORD CRANWORTH) has said, the obligation upon the Corporation, at the time of the passing of the North British Railway Act, in case the church had been burnt down and it had been necessary to restore it, would have been merely to provide another church with equal and similar accommodation to that which had been provided for the long period I have mentioned. Then it appears that the North British Railway Company, upon the introduction of their bill, desired to obtain powers for the purpose of removing this church for the construction of their railway; and if the question of compensation between them and the Corporation had been left to the ordinary provisions of the Lands Clauses Act, (an Act which passed, I think, only the year before this North British Railway Act,) it is perfectly clear, that all that the Corporation would have been entitled to receive as compensation would have been the amount which was necessary to build a church with similar accommodation to the one which was removed. And no jury would ever have given them what may be called a sentimental value for the church which

was to be removed, however great its architectural beauty might have been. But the Corporation were desirous of obtaining a larger sum than they could possibly have obtained by the ordinary mode of compensation, and the company were not unwilling to give them the advantage of a larger compensation than they would have received through a jury. Therefore I consider this 8th section of their Act to have been introduced for the purpose of providing machinery to enable the Corporation to receive a larger amount of compensation than they would otherwise receive. Now the mode which was adopted for that purpose was very plain. The Legislature provides, that the company shall not be allowed to remove the existing church until they shall have agreed with the Corporation on a plan for the rebuilding, at the expense of the company, and upon another site either within the parish or as near thereto as conveniently may be, of a new church, and that in such agreement provision shall be made for the adoption of the same style and model as the existing church.

Now that, as I apprehend, was the mode of ascertaining the value of the compensation which was to be paid to the Corporation. Plans, of course, could be made, and a suitable site would be ascertained, and an estimate would be made of the value of the site and of the cost of the building according to the plans which were agreed upon, and if there was any difference of opinion between the parties, the Sheriff was to settle it. But in that mode the sum of money was ascertained as the amount of compensation which the Corporation would be entitled to receive under this clause in respect of the church.

And then, in order to provide for this money passing into the hands of the Corporation, the Act declares that the company shall be at liberty to offer, and the Corporation to accept, a sum of money as compensation for the said church, and in lieu of the foregoing obligation. It is quite clear, that the contemplation of all parties was, that the cost of the erection of the church, according to the plans, upon a proper site having been ascertained,—that that sum of money should be the amount which should be paid over by the railway company and received by the Corporation as the amount of compensation to be received by the Corporation in lieu of the obligation which was imposed upon the railway company. There was not the slightest intention, that there should be any new obligation imposed upon the Corporation to erect the church in any different manner than they would have been required to do, supposing it had been left to the ordinary mode of compensation. There was not the least intention, that this obligation, which was attached upon the railway company merely for the purpose of fixing the value, should be transferred from the railway company to the Corporation upon the payment of the money. If that had been intended, it would have been easy to add just a few words, and after the words in lieu of the foregoing obligation, to have said “which obligation shall then be transferred to and fulfilled by the Magistrates and Town Council.” But no such obligation is imposed upon the Corporation. The money is transferred to them by this machinery which the Act has provided, and then the Corporation have only the same obligation attaching upon them which they would have had, if this clause had never been introduced into the Act. They are bound to provide a church with the same accommodation as that which previously existed, and that being so, it is quite clear, that only a portion of the sum of £17,000 would be applicable to that purpose. The sum of £7000 seems to be a very fair limit to their liability in that respect. The other £10,000, the surplus, is clearly applicable to the uses of the hospital.

For these reasons, I entirely agree with the opinion which has been so clearly expressed by my noble and learned friend.

Sir Hugh Cairns.—Before the question is put, will your Lordships allow me to submit two considerations which perhaps your Lordships might think it right to give weight to in your order? The first relates to the costs. Your Lordships propose (as I understood) to dismiss Forrester's action without costs. I would submit to your Lordships, that provision should be made in your order for the costs of that action, and of the appeal of the Corporation, and also, that it would be necessary in point of form, that provision should be made for the repetition or repayment by Forrester of the costs ordered to be paid to him, and which have been paid. And further, that in Clephane's action, in which the order which has been read by the LORD CHANCELLOR proposed to provide for the costs, the costs provided for should be not only the costs of the action, but also of the appeal, which would not follow without special words. The other point I should submit to your Lordships is one which has not been referred to in the argument on either side, but which I may perhaps mention as one which your Lordships may think it right to give some attention to in the order that goes into so much detail. An Act of Parliament passed in the year 1860, (called the Annuity Tax Abolition Act,) made, in §§ 56 and 57, certain provisions with regard to the city and town churches of Edinburgh, and it named as one of those Trinity College Church, and it transferred to the Commissioners under that Act such rights of administration and custody as were then vested in the Town Council and Corporation, with certain provisions as to pew rents. As I understand the order which has been suggested to your Lordships as the one fit to be made in this case, I am not aware, that that order would actually conflict with any of those provisions; but your Lordships might think it proper, that I should now mention the Act, in order that, if your Lordships in your wisdom thought fit, some notice should be taken of

it in your present order, with a view to prevent it appearing to conflict with the provisions of that Act of Parliament.

LORD CHANCELLOR.—My Lords, with regard to the last point which has been mentioned at the bar, I would not advise your Lordships, that it is either necessary to advert to it, or that it would be proper to do so—not necessary, because undoubtedly whatever may be the provisions of that Act, it will be quite competent to the Court of Session, in carrying your Lordships' directions into effect, to take the provisions of that Statute into consideration. But I should particularly object to mentioning that Act in the present order, because, although we approve of this church, as the property of the charity, being used for the benefits of the district, yet I apprehend, that your Lordships by no means mean to lay it down as law, that this church when rebuilt will become a parish church. With regard to the other point, I must confess, that I feel somewhat unwilling to go so far as to give the Magistrates of Edinburgh the whole of the expenses of this litigation, because I cannot but think, that a little more energy and diligence and a little more candour in these proceedings would have prevented the great delay that has taken place. At the same time, I am glad to say, that the conduct of the Magistrates in the argument of this appeal has been everything that could be desired by your Lordships. And if, therefore, your Lordships desire to give the Magistrates out of the charity fund the costs that they have been put to by reason of the proceedings in the suit of Forrester and Others, I shall entirely concur in your Lordships' views upon that matter. I think it will be necessary, that the order should be so expressed as to give to the Magistrates and to the appellants in Clephane's suit, if your Lordships approve of it, the costs of the appeal. I would therefore ask your Lordships to intimate your opinion, whether you think that the expenses of the Magistrates in Clephane's suit should come out of the funds of the charity, and I hope your Lordships will approve of its being now distinctly stated, that, in the administration of this fund for all the objects of the trusts, the parties who are intrusted with the carrying out of these trusts are not to consider, that the Court will be justified in allowing the costs of any proceedings, except those which are conscientiously and properly directed to the just ends of administering the charity.

LORD CRANWORTH.—My Lords, I concur with my noble and learned friend in all that he has said. In the first place, I certainly concur with him in a very deep regret at the expenditure of what I consider a very unnecessary amount of costs in a matter that might have been much more speedily and cheaply settled. But I confess I do not feel, that the case is strong enough to require me to say, that as the trustees of this fund the Magistrates ought not to have their costs. And therefore I shall concur in my noble and learned friend's proposal, that they should have their costs out of the funds of the charity.

LORD CHELMSFORD.—I entirely concur with my noble and learned friends.

Sir Hugh Cairns.—With regard to the repayment of the costs paid to Forrester?

LORD CHANCELLOR.—That would follow as a matter of course. I will put it into the order, and in that part of the order which declares, that the expenses properly incurred by the pursuers and defenders in the suit of Clephane and Others ought to be paid out of the funds of the charity. I will insert the words, "including the appeal," and also the defenders' costs in the other suit and appeal. And in the suit of Forrester and Others I will make this addition to the order, that any sums paid by the defenders to the pursuers under the interlocutors hereby reversed be repaid by the pursuers to the defenders.

The *order of the House*, as ultimately drawn up, was as follows:—"It is ordered and adjudged by the Lords Spiritual and Temporal in Parliament assembled, that *the said interlocutors*, so far as complained of in the said appeal, be, and the same *are hereby reversed*. And it is declared, that, under the circumstances of the case, and having regard to the usage which has uniformly prevailed since the establishment of the charity in the proceedings mentioned, it is fit and proper, that so much of the money received by the defenders (respondents) from the North British Railway Company as will be sufficient for the purpose, but not exceeding £7000, should be applied in the purchase of a site, and in building a church which, after reserving full accommodation for all the inmates of the hospital in the said proceedings mentioned, and persons connected therewith, will afford to the inhabitants of the district in the said proceedings mentioned as much accommodation as was afforded by the Collegiate Church, in the said proceedings mentioned, which has been removed. And it is further declared, that such church ought to be built in connexion with the hospital, (if the same shall be rebuilt under the scheme hereinafter described,) or on a site as near thereto as can be conveniently obtained: And it is further declared, that the duty of building such church belongs to the defenders (respondents), as trustees of the said charity, and that they will not be under any obligation to observe or follow the style or model of the old church in the said proceedings mentioned in such new building: And it is further declared, that such new church will be the property of the said charity, subject to its being used, and if so used, then to its being kept in repair, and maintained in like manner as the said old church was before its removal by the said railway company: And it is further ordered, that the defenders (respondents) do forthwith bring in and lodge with the Court of Session a minute, shewing the site and plan of building of such new church, and the building is not to proceed until such plan

and site have been approved of by the said Court: And it is further declared, that all the residue of the money received from the said railway company, and all interest thereon, and the rest of the property of the said hospital, is applicable to the enlargement and maintenance of the said charity as declared and established by the charters dated respectively the 12th November 1567 and 26th May 1587 in the said proceedings mentioned, according to a scheme to be settled for that purpose (including therein the rebuilding of the hospital if the same shall be deemed necessary): And it is further ordered, that it be referred to the said Court of Session to settle and approve of such scheme accordingly, and to inquire and ascertain of what the property of the said hospital consists, and in what manner the money received from the said railway company has been invested by the said defenders (respondents), and when such investments were made, and what sums have been received for interest thereon, and by whom and how such sums have been applied: And it is also further declared, that the expenses properly incurred by the pursuers and defenders in this cause in the Court below, and the costs properly incurred by the said appellants and respondents in this appeal, ought to be paid out of the funds of the charity; and it is therefore further ordered, that the expenses so properly incurred by the said pursuers and defenders in this cause in the Court below, and the costs so properly incurred by the said appellants and respondents in the said appeal, be duly taxed, and the amount of such taxed costs in the said cause in the Court below and the amount certified by the Clerk of the Parliaments of such costs of the said appeal, be paid out of such parts of the funds of the said charity as the said Court of Session shall deem most fit to be applied for that purpose: And it is also further ordered, that the cause be, and is hereby, remitted back to the Court of Session in Scotland, to do therein as shall be just and consistent with these declarations and directions, and this judgment."

Agents for Clephane and Others, Deans and Stein, Westminster; Wotherspoon and Mack, S.S.C.—For Magistrates of Edinburgh, Maitland and Graham, Westminster; Graham and Johnstone, W.S.—For Forrester, Loch and Maclaurin, Westminster; J. Webster, S.S.C.

MARCH 3, 1864.

HUGH TENNENT, *Appellant*, v. THE EARL OF GLASGOW, *Respondent*.

Process—Advocation—Sheriff Court—Cause exceeding £25—16 and 17 Vict. cap. 80—*When a cause is advocated from the Sheriff Court as exceeding the value of £25, the value is, for this purpose, to be computed by taking the amount which would have been recovered, plus interest, if the interlocutor of the Sheriff which is advocated had found for the pursuer.*

Reparation—Culpa—Negligence—Fence—Extraordinary fall of rain—*Damnum fatale*—*G. built a stone wall in lieu of a thorn fence bounding his property. A stream which ran through such property having become swollen with rain, at a point which was one third of a mile distant from the wall, burst its banks, left the channel, and flowed down a declivity to the wall, and there accumulating burst the wall, and crossing the turnpike road, flooded the grounds of T. on the other side. Before the wall was built, surplus water found a vent through the hedge. The Court found that the damage was caused solely by an unprecedented fall of rain, and not by G.'s fault.*

HELD (affirming judgment), *That the damage was a damnum fatale, and that G. was not liable.*¹

The action commenced with a summons, dated 8th June 1860, in the Sheriff Court of Ayrshire, which concluded for payment of £22 6s. 6d. for damages caused by a wall negligently built, and so causing floodage.

After condescendence and answers the record was closed, and proof was led. On 9th August 1861 the Sheriff substitute pronounced an interlocutor, containing various findings, concluding thus:—"Finds, therefore, the defender liable to the pursuer in the sum sued for, and in the lawful interest thereon, but commencing from the date of citation to the action; also with expenses." This interlocutor was adhered to by the Sheriff principal on 4th October 1861.

The cause was then advocated to the Court of Session, and after argument the following interlocutor was pronounced:—"12th December 1862.—The Lords," etc.: "Advocate the cause, recall the interlocutor of the Sheriff substitute and Sheriff principal complained of: Find, that it

¹ See previous report 1 Macph. 133; 35 Sc. Jur. 78. S. C. 1 Macph. H. L. 22; 36 Sc. Jur. 400.