

June 5, 1818

a judicial mouth, that I am compelled to say, that I think this action cannot be maintained.

SOLICITOR.—
PRESCRIP-
TION.—
SHIP'S HUS-
BAND.—
SHIP REGIS-
TRY.

Judgment **AFFIRMED.**

IRELAND.

APPEAL FROM THE COURT OF CHANCERY.

GORT (VISCOUNT) and MAYOR,
SHERIFFS, and CITIZENS of } *Appellants.*
LIMERICK,

ATTORNEY GENERAL—*Respondent.*

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INFORMATION by the Attorney General, at the relation of a freeman of Limerick, against the Chamberlain, and Lord Mayor, Sheriffs, and Citizens or Common Council of that city, stating that certain lands and revenues were granted to and vested in the corporation at large for divers public uses and purposes, the improvement of the city, and the preservation and support of public buildings, bridges, highways, and establishments therein: that the defendants had usurped the powers of the whole corporate body, and that the Chamberlain, in concert with the Common Council, had contrary to the charters and immemorial usage applied the revenues to their private purposes, without reference to the citizens and freemen at large, in their general assembly or Court of D'Oyer Hundred, &c.: and praying that the Chamberlain might account, and that a receiver might be appointed. Demurrers, for want of equity and jurisdiction, overruled by M. R.; and the order affirmed

by the *Lord Chancellor*, who was of opinion that the uses were charitable and that the fact was sufficiently alleged. Order affirmed in Dom. Proc.

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Information,
Jan. 8, 1816.

THE Attorney General for Ireland, at and by the relation of John Tuthil, a freeman of the city of Limerick, on behalf of himself and the rest of the freemen, on the 8th Jan. 1816, filed an information in Chancery against the Appellants, John Prendergast, Lord Kiltarton, now Viscount Gort, and the Mayor, Sheriffs, and citizens of the city of Limerick, setting forth, that Limerick was an ancient city, and a corporation by charter and prescription, by the name of the Mayor, Sheriffs, and Citizens; that by charters of Edward III., King John, and succeeding Kings, all which were confirmed by Queen Elizabeth, many franchises and privileges were granted to the citizens; and amongst other things that they should have all the lands and waste places within the liberties or precincts of the said city to dispose thereof, with the common consent of the citizens, &c.; that by virtue of the charters, the corporation was seized, &c. of a very considerable estate in lands, the rents of which, and the receipts for tolls and customs, amounted to a very large annual sum. And that the said estate and revenues, which were so as aforesaid granted to the said corporation, were so granted and vested in them, for divers public uses and purposes, for the improve-

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ment of the city, and the preservation and support of several public buildings, bridges, highways, and establishments therein. The information then proceeded to state, that a certain part of the corporation, denominated the Common Council, consisting of the Mayor and Sheriffs for the time being, Aldermen and Burgesses, had usurped the privileges of the Citizens, and had taken upon themselves in the name of the whole body corporate, but without the consent of the citizens or freemen at large, to make leases of the lands and dispose of the rents, tolls, and other corporation revenues as they thought fit, and best suited their own private purposes and interest: that in 1761, in consequence of the abuses, a parliamentary investigation took place, in the course of which the books had been inspected, and no clause in the charters or by-laws had been found, which empowered the Common Council to dispose of the estate and revenue of the corporation; and by the entries in the books, it appeared that the lands and tolls had been constantly let by public cant, yearly, in the Court of D'Oyer Hundred, or general assembly of the whole corporation; and that the election of members of the Common Council, and orders of the council, had been submitted to the Court of D'Oyer Hundred for their approbation, &c.

The information then stated that the Appellant John Prendergast Smith, since Lord Kiltarton, and now Viscount Gort, in or about 1785, had acquired sufficient influence amongst the principal

members of the corporation to procure himself to be elected one of the representatives in parliament for the city; he had afterwards obtained an absolute ascendancy over the Common Council, who had assumed to themselves the entire government of the city, and the exclusive management of the affairs and revenues of the corporation. That in 1786 the Appellant, then J. Prendergast Smith, procured himself to be appointed Chamberlain; in which capacity he received the revenues of the corporation, without accounting to the citizens and freemen at large, down to the time of filing the information: that in order to secure to himself and his family the representation of the city in parliament, and the patronage thereof, and the absolute controul of its affairs and revenues; he induced the Common Council to fill up the vacancies in that body from his own friends and dependants, without reference to the general assembly of the freemen, and to admit or reject freemen at its pleasure, without regard to the right, so as to exclude those who were not in his interest, and to admit persons who were not entitled, provided they were in his interest, by which means the corporation had been involved in numerous law-suits which the Chamberlain had defended out of the corporation funds; and particularly law-suits in 1795, 1798, and afterwards in 1813, still persevering in his illegal conduct in the management of the corporation affairs and revenues *in concert* with the Common Council, &c. &c.

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“ That according to the ancient immemorial
 “ usage and custom of said corporation, the said
 “ corporation lands should be let to the highest
 “ bidder by public auction, and all leases of corpo-
 “ ration lands should be submitted to the Court of
 “ D’Oyer Hundred, for its approval and confirma-
 “ tion, before the same became of any force and
 “ effect, as set forth in the said petition of the said
 “ *John O’Donnell* to the House of Commons; and
 “ that the corporation, tolls, and customs, should
 “ be also set up to sale by public auction, and
 “ should be sold and disposed of to the highest
 “ and fairest bidder, as set forth also in the said
 “ petition; and that the corporation revenue should
 “ be laid out and applied in upholding divers
 “ public buildings and bridges, in the city and
 “ liberties of said city, and in repairing, cleansing,
 “ and lighting the streets and highways in said
 “ city, and the liberties thereof; and that various
 “ grants of lands and other hereditaments to the
 “ whole corporate body were made for these pur-
 “ poses; and that the same should not be done as
 “ some of them are, and have been of late years,
 “ at the expense of the inhabitants by public pre-
 “ sentment at the assizes.”

And in the charging part it was stated that in consequence of the proceedings against the corporation in 1813, and other proceedings being threatened, the Appellant procured the Common Council to appoint certain friends of his own a committee of accounts, and laid before it certain garbled and

erroneous statements, &c. taking credit for the sums expended in resisting the just claims of persons entitled to the freedom of the city; but had never accounted to the whole body of freemen in the Court of D'Oyer Hundred; and refused to do so when called upon to account to that assembly in October, 1815. And the information then prayed for an account, and the appointment of a receiver.

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The Defendants demurred as follows:—

First, That the said information, in case the same were true, (which the said Appellant in no wise admitted), did not contain any manner of equity, whereon the said Court could ground any decree, or give the said informant any relief or assistance against the said Appellant. Demurrers.

And, Secondly, That the said Appellant was accountable only to the Mayor, Sheriffs, and citizens of the said city, as their Chamberlain.

That the said Appellants the Mayor, Sheriffs, and citizens of the city of Limerick, on the same day filed a demurrer to the said information, and assigned for causes of demurrer:—

First, That the said information, in case the same were true (which the said Appellants did in no wise admit), did not contain any matter of equity, whereon the said Court could ground any decree, or give the said informant any relief or assistance against the said Appellants.

Secondly, That the Court of Chancery had not, and would not exercise any jurisdiction by information, over a civil corporation, even in case of a misapplication of their revenues by them.

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And, Thirdly, That the said mayor, sheriffs, and citizens, had an absolute and unqualified right to dispose of their estates and revenues, and did not hold the same, or any part thereof, subject or liable to any trust, or to any account to be rendered thereof at the suit of the Attorney-General, or any other relator, or other person.

The Counsel for the Appellants further demurred, *ore tenus*, to the information for multifariousness.

The demurrers having been overruled by the Master of the Rolls and the Lord Chancellor, Lord Gort and the others appealed to the Lords.

Reasons.

The reasons in the printed case, on behalf of the corporation, were:—1st, That at common law a right of alienation is incident to all civil corporations, Sutton's Hospital case, 10 Co. 306—*Smith v. Barrett*, 1 Sid. 162—Com. Dig. Franchises, F. 10. And a civil corporation could not be compelled to account to the Court of Chancery for a misapplication of their funds, *Rex v. Caermarthen Corporation*, Coop. Ch. rep. 30—*Colchester Corporation v. Lowten*, 1 Ves. Beam. 226—*Drimmer v. Chippenham Corporation*, 14 Ves. 245. The effect of the appointment of a receiver would be to deprive the corporation of the benefit of their charters, and to give the Court of Chancery a visitatorial power over them:—2dly, No relief except the appointment of a receiver, was sought against the corporation, nor any misconduct imputed to it, the charges of misconduct being made against certain individuals of the corporation, called the Common

Council.—3dly, There was nothing in the information to show that a charitable use was the object of it, and a vague incidental statement that the property of the corporation was vested in them for the support of public buildings, bridges, highways, &c. &c. was not sufficient; *Attorney-General v. Smart*, 1 Ves. Sen. 72—*Attorney-General v. Parker*, 1 Ves. Sen. 43—*Attorney-General v. Ogländer*, 1 Ves. Jun. 246:—4thly, 5thly, and 6thly, Because the determinations on the subject of charitable uses in the courts of equity in England, were not applicable to Ireland, there being no Irish statute analogous to the statute of charitable uses, 43d Eliz. in England; and the questions in this case were to be decided according to the law as it stood before the enactment of that statute: and before that time a corporation could not be seized to any use; Gilb. U. T. 170—Bac. U. 57. And as therefore a grant to a corporation for an use would be void in Ireland at the date of the charters, it was impossible to conceive that the crown intended a grant for a void purpose:—7thly, It was not ascertained nor defined how much of the corporation revenues was applicable to charitable uses, and how much to other corporate purposes; and it was necessary that the charity fund should be certain, and the object defined. On behalf of Lord Gort particularly, the reasons were:—1st, That he was made a party as the officer of the corporation, not only for the purpose of discovery, but for relief:—2dly, That he was accountable only to the

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corporation, and was not a trustee for a charitable use.

And if the object of the information was to compel an account of revenues applicable to charitable purposes, and also of revenues applicable to other purposes, then it was multifarious.

Mr. Leach (now Sir J. Leach, V. C. E.) for Appellants.

The Judge below has said that the funds are applicable to charitable purposes, which founds the jurisdiction. That would be correct if it were alleged as a substantive fact, that they were so applicable; but it is not so alleged; it is merely a conclusion of law drawn by him; and the demurrer on that ground is good.

2dly, But suppose the jurisdiction established, this is an information against Lord Gort as receiver, and as such he is bound to account for his receipts to the corporation, or a part of it; and equity cannot interfere, except upon collusion by the corporation in breach of its duty: and there is on the face of the information no charge of such collusion. The information is that Lord Gort had so much influence over the Common Council, that he procured himself to be made Chamberlain; that he expended the revenues, not for the purposes of the corporation, but for the purposes of the Chamberlain, &c.; and that he accounted only to the committee, whereas he ought to have accounted to the corporation at large. But there is no allega-

tion that the body at large did not do its duty : or that it colluded with the Chamberlain and the other body.

The information prays that another receiver may be appointed ; but can the Court remove him, and appoint an officer of its own, when no collusion or corruption is charged ? This is a mere civil corporation, and the Court, by this proceeding, assumes a power of visitation, which cannot be exercised in equity : so that, unless collusion were charged, the demurrer is good on the part of the corporation as well as on the part of Lord Gort.

The only ground on which the information could be supported, would be that they were trustees for charitable uses. Formerly it was doubted whether they could be considered as trustees for charitable uses : but, at all events, here there is a defect of averment. The demurrer admits only the facts which are well pleaded, and the facts without the conclusion of law, *Ford v. Peering*, 1 Ves. Jun. 77 : and it is not here well pleaded that they are trustees for charitable uses. And, as the information applies to the whole of the revenues, though part of them had been stated to be applicable to charitable purposes, unless it were stated that the whole were so, the demurrer is good. *Attorney-General v. Corporation of Caermarthen*, Coop. Ch. rep. 30.

Sir Samuel Romilly. No principle is better established than that, although the Attorney-General claims more than he is entitled to, if he is en-

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Rex et Reg.
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12 How. St.
Tr. 1198.

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titled to any part of the relief, a general demurrer will not hold.

They admit that if a corporation has revenues applicable to the repair of bridges, highways, &c. that it is a charitable foundation; and it is here alleged as a fact that the corporation holds lands, which, by the terms of the grant, are applicable to these purposes. The Master of the Rolls and Lord Chancellor were clearly of opinion that it was stated that the lands were vested in the corporation for the repair of bridges, public buildings, and highways, which have been held to be charitable purposes. The information has the substantive allegation that, “the said estate and revenues, &c. were so granted and vested in them (the corporation) for divers public uses and purposes, for the improvement of the said city, and the preservation and support of several public buildings, bridges, highways, and establishments therein.” This cannot be said to be the mere legal effect of the charter. It is a distinct and substantive allegation, that there are in the grants certain objects which are considered as charitable objects. In the charging part of the information it is stated, “that, according to immemorial usage, &c. the corporation revenue should be laid out and applied in upholding divers public buildings and bridges in the city and liberties of the said city, and in repairing, cleansing, and lighting, the streets, and highways, in the said city, and the liberties thereof: and that various grants of

“land and other hereditaments to the whole corporate body were made for these purposes.”

Here are two distinct allegations of the application of these revenues, not merely by the charter, but by the practice also, and that grants of land were made for these purposes independent of the charter.

And though all the lands are not granted for these purposes, and the lands which are given for such purposes are not specified, are we not to have a discovery? On this ground alone the demurrer ought to be overruled.

If the complaint had been at the instance of one freeman, that the corporation were applying the revenues to party purposes, and particularly against the interests of the freemen, a question would arise which could not be easily disposed of. The question has been agitated. In the case of the *Corporation of Colchester v. Lowten*, the point, though not decided, was spoken of as doubtful. In the case of *Rex v. Watson*, in 2 T. R. 204. Ashurst, J. expressed an opinion that equity would give relief, and that extra judicial opinion was mentioned in the case of the *Corporation of Colchester v. Lowten*. The facts, as they must be for the present taken, are that Lord Gort was made Chamberlain in 1786, that he never accounted to the whole body, nor to a select portion of it: and applied the revenues to his own private purposes, and that these proceedings took place in concert with the Common Council; so that there is an allegation of collusion. Besides, the Chamberlain

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Colchester
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1 Ves. Beam.
226, 244,
245.

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Rex v. Wat-
son, 2 T.
R. 200. 204.

Sir T.
White's
Charity. Vid.
2 Vern. 397.
Col. P. C.
280.—2 Bro.
P. C. 236.

is a trustee of a fund for charitable purposes, and the Attorney-General has clearly a right to call him to account. The demurrers are bad also in form, for they are speaking demurrers, introducing new facts.

Mr. Bell. A corporation has clearly a right to alienate its landed property. Whether it can apply its funds to improper purposes has not perhaps been decided; but the *dictum* of Ashurst, J. is against that power. If mayor or receiver applies the corporation charity fund to his own use, he is liable to account, though the proceeding should be sanctioned by the corporation, as in Sir T. White's charity, Duke 577.—But here the receiver never accounted to the whole corporation.

Mr. Leach, (now Sir J. Leach, V. C. E.) The Attorney-General stated merely what he considered as the effect of the charter, and the practice merely of applying the funds to charitable uses would not fix upon this the character of a charitable trust. But even though it were a charitable trust, the Court will leave the officer to account to the corporation, unless it is averred that the corporation colluded: and it is not averred that the whole corporation colluded. The demurrers were not speaking demurrers; no new facts were introduced, and what were so called were only reasons.

Order AFFIRMED.