

the cause be, and is hereby, remitted back to the Court of Session in Scotland to carry this judgment and these declarations and orders into effect.”

For Appellants, Dodds and Greig, London; Morton, Whitehead, and Greig, W.S., Edinburgh.
—*For Respondents*, J. F. Elmslie, Solicitor, London; John Cullen, W.S., Edinburgh.

JULY 24, 1861.

THE MAGISTRATES AND TOWN COUNCIL OF DUNDEE, *Appellants*, v. THE PRESBYTERY OF DUNDEE, *Respondents*.

Trust—Charity—Royal Charter—Construction—Church—Poor—*Circumstances in which, with reference to a charter granted to the Magistrates of Dundee, by Queen Mary in 1567 (afterwards confirmed by James VI. and Charles I.), and to various documents:*

HELD (affirming judgment), *That a trust of certain property was validly created in the Magistrates of Dundee, “for the sustentation of the ministry of the Word of God, and the support of the clergy” of the Established Church within the burgh.*

HELD further (reversing judgment), *That, a will dated 1638 having given a legacy to the Magistrates for aged and impotent poor, part of which sum was invested in land without apparent authority, the land must be treated as confined to the purpose of the legacy and not to the support of the clergy.*¹

The Magistrates of Dundee appealed, maintaining in their case, that the judgments of the Court of Session of 4th July 1856 (interlocutor signed 18th July) and 18th March 1858, should be reversed—1. Because the hospital fund is not an incorporated trust, and does not owe its existence to, and is not dependent for the laws of its administration and distribution upon, the charter of Queen Mary. 2. Because, if it be held that such a trust as is described in the interlocutors appealed against was originally constituted in the town of Dundee, by Queen Mary’s charter, the trust, as so constituted, was subsequently altered by competent authority. 3. Because, on the true construction of Queen Mary’s charter, even without the aid of extrinsic evidence, but still more the aid afforded by such evidence, the ministers of Dundee had not any primary claim, or any claim preferable to that of the poor, in regard to any subjects acquired under that charter. 4. Because, having regard to the conclusions of the summons, and the averments made by the pursuers in the record, the whole findings by which mortifications or bequests subsequent to the date of Queen Mary’s charter, and the purchases and investments made by means thereof, are found applicable for behoof of the ministers of Dundee, are not only unsound, but are *ultra petita*, and incompetent in the present action. 5. Because, whatever may be held with respect to the subjects specifically conveyed by Queen Mary’s and subsequent royal charters, and the savings and accumulations from such subjects, and the investments made with such savings and accumulations, at all events the old hospital, and its property, “Monorgan’s Croft,” and the whole other properties and funds constituting what is commonly known as the hospital fund, are derived from mortifications, legacies, or bequests for totally different objects,—at all events for objects in which the ministers of Dundee are in nowise interested,—and cannot be held to be funds or property held under Queen Mary’s and other royal charters, or to be applicable to the support and maintenance of the ministers of Dundee. 6. Because the two interlocutors appealed against, in so far as they admit the clergy to participation in the revenues of Monorgan’s Croft, are at variance with the terms of the title on which that property is now, and for the last two centuries has been held; the more especially as that title has never been, and is not now, impeached in the present or any other competent process; and because, even supposing that title to have been originally open to challenge, which is not alleged, all right and claim of action, having for object to subvert the terms and conditions of the trust appearing *ex facie* of that title, are now barred and cut off by prescription. 7. Because, in the absence of countervailing evidence, where the minutes of council or conveyances to the hospital master bear that any purchases, or mortifications, or investments, were for behoof of the poor, without mention of any other object, such purchases, investments, and mortifications must be held as applicable for behoof of the poor alone, and not to form part of the common estate, applicable

¹ See previous reports 20 D. 849 : 28 Sc. Jur. 592 : 30 Sc. Jur. 452. S. C. 4 Macq. Ap. 228 : 33 Sc. Jur. 707.

as well for the ministers as for the poor ; and because no such countervailing evidence has been adduced. 8. Because the appellants were only made parties to this action *qua* trustees of properties and funds held and enjoyed by the burgh of Dundee under and by virtue of a charter granted by Queen Mary, 15th April 1567, and by virtue thereof devoted to the support and maintenance of the ministers of Dundee ; and because the findings and decrees in this action, in reference to funds or property arising from other or subsequent bequests or mortifications were incompetent, the more especially in the absence of any one to represent the poor, or the aged, and impotent people of Dundee. 9. Because, having regard to the conclusions of the summons, and to the whole pleadings of the respondents, and still more, having regard to the parties called as defenders in the present action, and particularly to the fact, that the hospital master is not made a party to it, no findings could be competently pronounced in this action in regard to subjects consisting of, or derived from, properties or funds bequeathed, or mortified, or conveyed to the hospital master alone, as trustee, by any parties, or, at all events, by any parties other than the trustees under the various royal charters founded on by the respondents. 10. Because, even assuming, that by the charter of Queen Mary an incorporated trust was created, and still subsists for the benefit as well of the ministers as of the poor of Dundee,—regard being had to the fact, that an existing institution and building, specifically called ‘The Hospital,’ existed in Dundee, and was inhabited by the poor, and managed solely for behoof of said poor by an officer called the hospital master, from long before the date of Queen Mary’s charter down to about the year 1646 ; and to this other fact, that the name of the incorporated trust fixed by the said charter was “Fundatio nostra Ministerii et Hospitalitatis de Dundee,” all bequests, mortifications, or conveyances made generally to “The Hospital” or to the “Hospital and Eleemosynary” of Dundee, and without any other special limitation of purpose, ought, from that very circumstance, to have been found not to be applicable for behoof of the ministers of Dundee, especially as none of the bequests, mortifications, or conveyances were made to the trustees of the said incorporated trust appointed by the said charter and the subsequent royal charters founded on by the respondents. 11. Because, when the terms of bequests or of deeds of mortification prove property or funds to have been bequeathed or mortified to “The Hospital” generally, or to the hospital and eleemosynary of Dundee, without any other special limitation of purpose ; and still more, when the terms themselves of such bequests or mortifications have not been preserved, and the minutes or account books of the hospital enter them only in general terms as bequests or mortifications to the “Hospital,” the contemporaneous mode of dealing with and administering such bequests or mortifications, and the usage thereon following, are admissible in evidence to aid in determining to what purposes they are applicable ; and because, if such evidence were admitted, and given effect to, which it was not, it would establish, that such funds and property are not applicable for behoof of the ministers of Dundee. 12. Because the finding, that in regard to funds “held by the hospital specially for the poor, they are to be taken to relieve *pro tanto* the general funds of the foundation, to the effect of thereby leaving an ampler income for the fulfilment of the other purpose of the trust,” is *ultra petita* ; and even were it not so, would be incompetent, as an undue interference with the discretion of the appellants as trustees ; and further, as having been pronounced *proprio motu* of the Court of Session, without either the subject matter of the finding having been argued, or an opportunity for arguing it having been given to either party ; and as being generally contrary to law. 13. Because the views taken by Mr. Jamieson in framing the accounts for the period to which his report specially applies are incorrect in point of both law and fact, so far as relates to the matters complained of in this appeal ; and particularly, in so far as relates to the savings and accumulations from the hospital funds, and to the charges applicable to capital and revenue, and to the results stated by the accountant ; and because the objections stated by the appellants in their note of objections to the accountant’s report are well founded in point of both fact and law. 14. Because, even if the hospital fund be held to owe its existence to Queen Mary’s charter, as no particular part or proportion of the revenues of the hospital had been allocated by that or any other charter for behoof of the ministers of Dundee, a discretion to regulate the proportion and amount to be given to the different objects intended by the said charter to be benefited, rests with the appellants, which cannot, or at least, in the circumstances of the present case, ought not, to be interfered with. 15. Because, after all the parties to the cause had arranged, to the satisfaction of the reporter, Mr. Innes, and had paid to him an ample and suitable fee, which was accepted by himself as sufficient, the Court below, *ex proprio motu*, fixed the said reporter’s fee at 400 guineas, and decerned therefor without a remit, and without having taken any other means to ascertain the proper amount, and without hearing parties on the matter ; and because such a course of proceeding is *ultra vires* of the Court.

The presbytery supported the interlocutors on the following grounds :—1. Because the charter granted by Queen Mary constituted a trust in the provost, magistrates, and town council of Dundee, for and on behalf of the hospital, the object of which was the maintenance and support of the ministers of the Church of Scotland in Dundee, and, after that was sufficiently provided, for the support of poor, maimed, and miserable persons and orphans within the burgh of

Dundee. 2. Because all properties conveyed to, or acquired by, the appellants, or their predecessors, or the hospital masters, as trustees for behoof of the hospital, ought to be applied in conformity with the trust constituted by the original charter of foundation; and the appellants have not averred any use or application of the hospital funds to which effect can be given, so as to prevent, in the first instance, an adequate provision being made for the support of the ministry in Dundee. 3. Because all purchases or investments made by the appellants, or their predecessors, or the hospital masters, from the funds of the hospital, ought to be held for the purposes of the trust; and, in particular, the property called Monorgan's Croft, having been purchased in name of the hospital master, for behoof of the hospital, cannot be claimed either as property belonging to the town of Dundee, or as applicable exclusively to the support of the poor. 4. Because all bequests to "the Hospital" must be held to be bequests for the purposes of the original grant; and ought not to be diverted to the support of the poor, to the exclusion of the purpose of trust first mentioned in the original grant. 5. Because the ground called "The Howff" having been conveyed to the hospital, subject only to the condition that the inhabitants of Dundee should be allowed to bury their dead therein, the property thereof, and revenue derived therefrom, belong to the hospital. 6. Because, even assuming legacies specially bequeathed for the support of the poor to be applicable exclusively to that purpose, such funds must be applied *pro tanto* to relieve the general funds of the foundation, so as to leave a larger income for the support of the ministry; and no savings or accumulations having in point of fact been made from such legacies, it cannot be maintained that any of the purchases were made from such a source.

The Attorney General (Bethell), and *R. Palmer* Q.C., for the appellants.

Rolt Q.C., *Sir H. Cairns*, Q.C., and *Neish*, for the respondents.

The arguments turned entirely on the construction of the charters and documents, and the inferences to be drawn therefrom.

Cur. adv. vult.

LORD CRANWORTH.—My Lords, the ground on which the appellants complain of the first interlocutor is, that it puts a wrong construction on Queen Mary's Charter; that it treats that instrument as having created a valid trust in favour of the ministers of Dundee, whereas no such trust was created. But I am clearly of opinion, that the trust in favour of the ministers was created.

The charter has been so often stated at length in the course of the argument at the bar, that I do not think it necessary to repeat its contents. It is enough to say, the grant of the ecclesiastical property, which it makes to the town, is prefaced by a recital, stating, as the motive for the grant, that the Queen, to whom the rule of the kingdom by God's providence had been intrusted, was bound by Her duty towards God to provide by all honest means for the ministers of His word, and to keep up hospitals for the poor, the maimed, and the destitute, and therefore she, with the advice of Her Privy Council, granted to the provost, bailies, and council of Dundee the ecclesiastical property therein described, and which had formerly belonged to certain ecclesiastical establishments in the town.

Now, unless this recital of the motive for the grant be understood as intended to impose on the grantees the duty of applying the property granted in such a mode as shall discharge the obligations of the Queen to make the grant, the recital would have been useless. It is plain, that the intention was to make the grant, in order that thereby a very solemn duty imposed on the granters might be fulfilled.

This would, I think, have been the reasonable interpretation of the charter, even if we had to construe it unassisted by the light afforded by contemporary history. But, when we recollect what was happening at the time when the charter was made, its intention is made even more manifest. In consequence of the then recent changes in the religion of the country, large masses of ecclesiastical property had been violently torn from the former possessors. That property had afforded support to the ministers of the old religion, and had largely contributed to the relief of the necessitous. Nothing, therefore, could be more probable than that portions of it should be, from time to time, appropriated by the Crown for the purpose of supplying, in particular places, the want which its confiscation must have occasioned to those to whose support it had previously contributed. What we should expect in any grant by the Crown of such property would be, that it should be devoted to the ministers of the reformed religion, and to the poor; and this *a priori* probability, as to what would be the destination of the property granted, may well help us in understanding the terms of the grant if doubtful. Not that I consider any such help in this case to be necessary. I concur with the Court of Session in thinking it clear beyond all reasonable doubt, that this charter of Queen Mary created a trust in the authorities of the town in favour of these classes which had formerly been practically in the enjoyment of the property granted, namely, the poor, and the ministers of religion,—as to the latter, however, substituting for the Romish clergy the ministers of the reformed religion.

These considerations are sufficient to dispose of all questions arising on the first interlocutor.

The views of the Court below are satisfactorily summed up in that part of the interlocutor which precedes the renewal of the remit to Mr. Innes, and in which the Court finds, "that the funds of the foundation are to be applied in providing adequate stipends to the said ministers, so far as not otherwise provided for them; and that the defenders, in the due execution of the trust committed to them, are under obligation to apply the same accordingly, in so far as the same are not exhausted, as is averred, by the payments already made to such ministers, or in so far as it can be made out, that the same are not exhausted by other and legal application to another purpose of the trust." This finding appears to me properly to explain the trust on which the authorities of the burgh hold the property included in or governed by the trusts of the charter; and I can therefore discover no ground whatever for quarrelling with the first interlocutor.

The object of the second interlocutor was, to declare of what particulars the property subject to the trusts of the charter consists; and the objections of the appellants are, that, supposing valid trusts to have been created by the charter in favour of the ministers of religion and of the poor, still much of the property now held by the town, in union with that which is derived from Queen Mary's charter, is held under different titles, and is not subject to Queen Mary's trusts.

And first, and principally, as to the old hospital and its property. The appellants contend, that they held this by a right prior to the date of the charter, and independent of it, and so that it is unaffected by Queen Mary's trust.

The hospital is shewn by the evidence to have been founded in the fourteenth century by James de Lindsay, who granted it to the Friars of the Holy Trinity in Dundee, commonly called the Red Friars *in hospitali et domu Dei*, by the tenure of Frankalmoigne. That grant was afterwards conferred by King Robert the Third, to hold the same tenement to the friars in *Frankalmoigne ad sustentationem dictorum fratrum et infirmorum senum et ægrotantium ibidem*. There is no evidence relating to the hospital from the time of its foundation down to the year 1544, but in that year, and in the beginning of 1545, there is proof, that three small annual rents were granted to Robert Mylne, the elder, described as a burghess of the burgh and master of the hospital. It is further shewn, that, in 1554, an annual sum of one mark was granted in the presence of William Carmichael, master of the alms house, to the said alms house in perpetuity, and, on the 25th of July 1563, a grant of an annual rent of five pounds was made to Thomas Ogilvie, described as master of the hospital or alms house of the said burgh, for the use of the said house and their successors.

From the evidence, it is impossible not to infer, that the hospital or *domus Dei*, though originally granted to the Friars of the Holy Trinity, had come to be administered by a secular authority. How this happened does not appear; but on no other hypothesis can I explain the fact, that there was a regular officer, plainly not one of the Friars of the Holy Trinity, acting as master of the hospital, and apparently enjoying a corporate character. Probably, as I have already suggested, the town had, in the confusion incident to the earliest religious disturbances, seized the property and endeavoured to appropriate it to themselves, or they may have taken possession of it under the royal authority I shall now refer to. Among the papers before us is an order of council made on the 15th of February 1561. The Queen, by advice of her council, thereby ordered that all annual rents and duties within free burghs, pertaining as well to chapelries and prebendaries as to the friars, together with the rents of friars' lands, wheresoever situate, should be collected by such persons as her grace should depute thereto, for employing the same to hospitals, schools, and other godly uses. And, knowing that nothing was more commodious for the said hospitals than the places, *i. e.* the buildings of friars yet standing undemolished, she ordained the provost and bailiffs of the burghs of the realm to uphold the said friars' places out of the common good, (*i. e.* revenues of the said towns,) until the Queen's Majesty should further advise, and should take final order therein, notwithstanding any other gift of the said places theretofore made by the Queen to any person whomsoever.

We find from the minutes of meetings of the magistrates and town council of Dundee that, on the 19th of October 1563, being less than two years after the date of the above mentioned order of council, the authorities of the town appointed the alms house masters, and that apparently as if they were not so acting then for the first time. The great probability therefore is, that the municipal authorities of Dundee took possession of the hospital in that town, and the property attached to it, either by virtue of that order in council or in anticipation of it.

The next document of importance is the order of council of the 10th of January 1566-7, whereby commissioners were appointed for the purpose of taxing the burghs of the realm with the payment of annual sums for the support of the ministers of religion. The order proceeds to say, that, for the relief of the said burghs, the Queen, by advice of her council, granted to the burghs the annual rents of altarages, chapelries, and obits within the same not already disposed to others, for the purpose of thereby relieving the taxation to be made by the commissioners, and the surplus of such rents, if any, to be distributed to the poor and hospitals of every burgh within themselves, by advice to the ministers and elders thereof.

The conclusion, as matter of fact to be deduced from all these documents, appears to me to be, that, at the date of Queen Mary's charter, in April 1567, the municipal authorities of Dundee

had, either under the orders of council to which I have referred, or by some earlier or other title now incapable of explanation, obtained possession of the whole of the property formerly of the Trinity Friars, including the hospital, and that they were administering its funds for the general purposes of an hospital for relief of aged and sick poor.

In this state of things Queen Mary, by her charter, dated the 15th of April 1567, granted to the town the revenues of the Grey Friars, the Black Friars, and the Grey Sisters, and of all chaplainries, altarages, and prebends within the burgh.

It was strongly urged by the appellants, that there are no words in this grant by Sir James Lindsay of the Friars of the Holy Trinity, nor, indeed, of any of the possessions of that body, and I think they are right in that contention. But the reason why this property was not included in the grant appears to me to have been, that, by some means or other now incapable of explanation, the town was already in possession of it, and in possession of it in a corporate character, by the description of the hospital or alms house of Dundee. This will fully explain the subsequent part of the charter, whereby the Queen unites and incorporates the property into one body, to be called in future "Our Foundation of the Ministry, and Hospital or Hospitality of Dundee." It was said, that the property thus united and incorporated does not include anything not included in the grant. I am by no means sure, that it does not. The town was already in possession of the property of the Friars of the Holy Trinity, including the hospital. The language of the incorporation is not in terms by reference confined to the property granted by the previous part of the charter, and as the immediate subsequent usage shews, that it must have been intended to administer the whole as one property, I am by no means satisfied, that the general words of the incorporation might not have been intended to comprehend the property of all the former ecclesiastical bodies in the burgh, as well that already possessed by the town as that included in the grant. It is not impossible, that this union and incorporation may have been desired by the town in order thereby to make good some defect in the earlier title to what they held. But, if that is not so, still the evidence satisfies me, that, from the time of the grant, the town treated the whole as one common property, to be all administered as one trust fund, designated as the hospital.

It is certain, that this has been the principle on which the revenues have been disposed of since 1581. All the revenue has been treated as belonging to the hospital. The language is—the charge, or rental of the master of the hospital of Dundee, containing the rents, etc., "which pertained of old to the hospital, as also of the Grey Friars," etc., "now doted to the said hospital by our sovereign lord and his progenitors," etc. From this it appears, that the master of the hospital was the person who was to administer the whole, and the grant of Queen Mary was treated merely as a further endowment of the hospital, with further trusts attached to it.

In conformity with this view of the case, we find, that, as early as any records go back after the date of the charter, annual payments were regularly made by the master of the hospital to the ministers of religion in the burgh, out of the sums coming to his hands from both sources, namely, from the old property of the hospital, and from that granted by Queen Mary, no distinction whatever being made in the accounts as to which property supplied the funds. I observe also, that in 1588, certain title deeds which had been put into the hands of a professional man, in reference to law suits in which the town had been involved, were all restored by him to the master of the hospital, he being, I suppose, the proper *custos*, and these deeds clearly related some to the old property of the hospital, and some to that added by Queen Mary. This furnishes an additional proof, that the property described as the hospital was all administered as one trust fund, under the management of a functionary designated the master of the hospital, or, sometimes, of the alms house.

Finding, then, that ever since the date of Queen Mary's charter, a period now of nearly three centuries, the old hospital property and that granted by the charter have always been treated as constituting one trust estate, administered by the town, through one functionary, and applied in trusts corresponding or intended to correspond with Queen Mary's trusts, I think the inference reasonable, that from the date of the charter it was always intended to deal with the whole as if it had all been derived from the same source.

I may add, that, out of the savings from the common funds, namely, from the rents as well of the hospital property so called as of the lands granted by Queen Mary, many investments were from time to time made for the benefit of the hospital, and many gifts or bequests have been from time to time made to the hospital, in neither case specifying the nature of the trusts. This seems to me to be inconsistent with the hypothesis, that the funds of the hospital, including those derived from Queen Mary's charter, were not all applicable to a common purpose.

Having come to this conclusion, I am prepared to say, that I think the second interlocutor is right, so far as relates to the first four heads or divisions of it.

The first head, though not, I think, happily worded, means no more than, that the providing of stipends for the ministers is one of the express trusts on which the town holds the trust property. It is in fact only what had been declared in the first interlocutor.

The second and third heads are introduced to guide those who are afterwards to administer

the funds, by pointing out what is clearly right, namely, that purchases made generally by the corporation out of their savings or general trust property, are, in the absence of any express declaration, to be considered as mere additions to the corporate property subject to all the trusts affecting it.

Then comes the fourth head, which in substance declares, and, as I have explained in my opinion, correctly declares, that the hospital is to be considered as affected by the same trusts as those under which Queen Mary's lands are held.

These bring us to the fifth head, of the interlocutor, that relating to Monorgan's Croft. On this head I am unable to concur with the Court of Session. The facts of the case are tolerably clear. Robert Johnstone, by his will, dated the 30th of September 1639, gave to the Provost and Bailies of Dundee the sum of £1000 sterling, to be employed in a stock or wadset of land, in perpetuity, for the yearly maintenance of the aged and impotent people of the said town of Dundee. Johnstone must have died before July 1642, for, by a minute in the books of the Town Council of Dundee, dated the 12th of July 1642, we find, that the council then ordered, that the said sum of £1000, or so much of it as should be obtained, should be waired and employed on land or otherwise, where best commodities might be had, the annual rent thereof to be totally employed for the maintenance of the poor decayed neighbours within the burgh.

By several subsequent minutes in that same year, it appears, that the sum of £750, part of the £1000, was received by the town before the 15th of November 1642, for on that day the town gave a heritable bond for that sum to the master of the hospital. The bond was for 13,500 marks Scotch, being equivalent to £9000 Scotch, or £750 sterling.

The balance of the legacy, being £3000 Scotch, was not paid till the year 1646, but by a minute of council, dated 2d of June 1646, we find, that this balance had then come to the hands of Alexander Wedderburne, their clerk, and it was disposed of by their direction as follows:—2500 marks, part thereof was retained by Wedderburne as the purchase money for Monorgan's Croft which was disposed by him to the hospital, and the rest (*i. e.* 2000 marks) was paid over to William Duncan, the master of the hospital, to be employed for behoof thereof.

The correctness of these minutes is fully confirmed by the books of the hospital. Those books contain, amongst other things, the accounts of William Duncan, the master of the hospital, in the years 1645, 1646, and 1647. He charges himself with the receipt from his predecessor of the bond given by the town for £9000 Scotch, and also with having received in June 1646, £3000 Scotch, equal to 4500 marks, from Johnstone's executors as the balance of his legacy. He takes credit, on the other hand, for a sum of £1666 13s. 4d. Scotch, equal to 2500 marks, as paid in June 1646 to Wedderburne, for Monorgan's Croft, and it appears, that at Lammas (1st August) 1646, he lent to Thomas Scot, on his bond, a sum of £1333 6s. 8d. Scotch, equal to 2000 marks, being probably the remainder of the £3000 which he had received in June as the balance of Johnstone's legacy. There is no doubt, therefore, that a sum of 2500 marks Scotch, part of this legacy, was in fact applied in the purchase of Monorgan's Croft, but the Court below considered, that though the payment to Wedderburne was made out of the money received by him as the balance of Johnstone's legacy, yet the purchase must be considered as having been made by the hospital out of their general funds, and that the fact of the payment having been made out of the money which had been previously received by Wedderburne on account of the legacy, was merely an arrangement by way of convenience, not indicating any intention of treating the purchase of Monorgan's Croft as an investment of a part of the legacy.

It is remarked by the Lord Justice Clerk, that Johnstone's will did not authorize an investment in land; and our attention was directed to a minute of council, dated on the 18th of March 1645, being about two months before the appropriation by Wedderburne of his purchase money, by which minute it appears, that the council had contracted with him for the purchase before (so far as appears) any part of the legacy had come to his hands.

With regard to the observation, that the will did not authorize an investment in land, it is very true that it did not, unless land can be deemed to come under the term stock, which can hardly be contended. But what we are to consider is, not whether if this investment had been questioned, those who made it could have justified what they had done, but whether it was not in fact intended to be an investment of a part of the legacy. I cannot doubt, that it was so intended. The council clearly thought, that they might invest in land; for by their minute of the 12th of July 1642, to which I have already referred, they expressly order, that the legacy, when received, shall be waired and employed upon land or otherwise. They contracted with Wedderburne, their clerk, for the purchase of this close, expressly for the hospital, a few weeks before he had received the money, but when, in all probability, they knew that it would speedily be forthcoming, and the master of the hospital, debiting himself with the whole balance which came to Wedderburne's hands, takes credit for the purchase money of the croft as for so much money paid to him. I think it therefore impossible not to consider, that a part of Johnstone's legacy was invested in the purchase of Monorgan's Close, and so, that in that respect the second interlocutor ought to be varied.

This disposes of the whole question; for, as to the sixth head, relating to the Howff, there can

be no dispute. It was part of the property conveyed by Queen Mary's charter, though subject to a servitude, *i. e.* a right of the inhabitants to bury their dead there.

The seventh head merely declares in substance, that certain bequests made for specific objects are to be applied according to the trusts declared in relation to them; and that in the application of the funds, according to Queen Mary's trusts, for the benefit of the ministers and the poor, those who are to administer the trusts may take into account, in the exercise of their discretion, any funds expressly applicable to one of these charitable objects.

The rest of the interlocutor merely relates to the accounts to be taken with a view to an ultimate decision, and this was not objected to. My advice to your Lordships, therefore, is, to affirm the interlocutors appealed from, except as to the fourth head of the second interlocutor; and as to that, to remit the case back with a declaration, that Monorgan's Croft is to be held on the trusts declared by Johnstone's will as to the legacy of £1000 thereby bequeathed.

My Lords, I have the authority of my noble and learned friend LORD BROUGHAM, who is not able to be present this morning, to say, that he concurs in this view of the case. I believe, that my noble and learned friend opposite does not quite agree with respect to the hospital. Under these circumstances, my noble and learned friend, LORD BROUGHAM, being absent, probably would not be counted in a division of opinion, but inasmuch as there is the judgment of the Court below, and the rule is, that where your Lordships are equally divided, the judgment is *pro negante*, the result is the same as if LORD BROUGHAM had been present, namely, that the judgment of the Court of Session will be affirmed as to both points, and that the cause will be remitted with a declaration. I think, that the appeal ought to be dismissed with costs, so far as relates to the first interlocutor. As to the fourth head of the second interlocutor, to remit the cause with a declaration.

LORD CHELMSFORD.—My Lords, I am unable to agree with the learned Judges of the Court of Session, and with my noble and learned friends, in the construction which they have put upon Queen Mary's charter. It is impossible for me to feel any great confidence in any opinion which stands alone, in opposition to the conclusions of so many who are entitled to the greatest deference. But I have the satisfaction to think, that the practical result of adopting my view, or that of my noble and learned friend who has just addressed the House, will have but a small bearing upon the rights which we both agree have been established by the ministers of Dundee.

In considering the case, it will be unnecessary to refer to more than a small part of the two interlocutors appealed from. In the first interlocutor, the Court of Session find that, according to the sound construction of the said grant, the funds and property held and enjoyed by the burgh of Dundee, under and in virtue of the charter granted by Queen Mary, bearing date the 15th April 1567, and subsequent charters and acts of ratification confirming the same, now commonly known as the hospital fund, are, by the terms of the trust, so created to be applied to the sustentation of the ministry of the word of God, and the support and maintenance of the clergy of the Established Church of Scotland within the Burgh of Dundee.

With this finding, subject to a remark on the ambiguity of the expression, now commonly known as the hospital fund, I entirely agree.

In the second interlocutor, they find, that the defenders have referred to no separate title to the old hospital and its property, and have not been able to shew in what way or when they acquired any right to the same; and that the management of the same having been assumed by the town council after the abolition of the papal establishment, which had previously administered it, the same fell within the scope of the general terms of Queen Mary's grant, and became part thereof, and has been administered and managed since 1567. I differ with this interlocutor upon the question of fact, as to the management of the old hospital having been assumed by the town council after the abolition of the papal establishment, and in the conclusion drawn from the fact thus found, that its property fell within the scope of the general terms of Queen Mary's grant.

(His Lordship then commented on the evidence bearing on this point and continued.)

From the close examination which I have made of the documents, I have satisfied myself, that the revenues of the hospital properly so called, were not applicable to any other purpose than the maintenance of the poor within the hospital; and upon any other view, I find it impossible to explain the recital and provisions of one of the acts which was mentioned in the course of the arguments, and which though temporary merely, and now expired, yet for the purpose for which it was referred to is extremely important.

The 20th Geo. II. recites that, "whereas it is found proper and necessary that the hospital in the said town now used for the reception of decayed burghers, should be converted into and made use of as a workhouse, for employing and setting to work the poor inhabitants of the said town; and that the revenue appointed for the support and maintenance of the said decayed burghers should be applied for and towards paying constantly to them for the time being for their support and maintenance," and then proceeds thus—"and forasmuch as the annual revenue applicable for the relief of the poor burghers of the town of Dundee may in some years amount to more than will be necessary to pay such poor burghers for their support and maintenance, be it enacted, that in case any overplus money shall at any time remain in the hands of the magistrates

and town council after the previous revenue shall be paid to such burghers, it shall and may be lawful for the said magistrates and town council from time to time to lay out and apply such over-plus money for and towards the repairing the said workhouse and maintaining the poor therein." This act is utterly irreconcilable with the notion, that the ministers of Dundee had any claim upon any portion of these particular funds, and it sanctions the appropriations which have been made of them to the support of decayed burghers. And it may be observed, that even if it could have been shewn, that the burgh had misapplied the hospital funds, yet the ministers would have no right to complain of the misappropriation, unless they could have proved that they had an interest in them.

I do not think that the circumstance of there having been payment made to the ministers by the master of the hospital from time to time, is at all material to the decision of this question; for the observation of the Lord Justice Clerk is perfectly correct, that "there can be no prescription against the express and declared object and condition of the grant, and the defenders as administrators cannot found on any prior application of the funds in order to defeat the object for which alone they obtained the grant." If, therefore, the ministers had no right under the grant of Queen Mary, the payments made to them by the burgh could not establish a right; and if they were entitled to a provision by the terms of that grant, the varying amount of the payments made to them from time to time would not leave them to the arbitrary discretion of the burgh to give or withhold this provision at pleasure. But, in fact, during the whole time the ministers had an undoubted right to have suitable and adequate stipends provided for them out of the foundation of the ministry, and hospital of Dundee, created by the union and incorporation of the possessions of the Dominican or preaching friars, or Franciscans, and Grey Sisters, in the charter of Queen Mary. It is said, that there is no difficulty in distinguishing the property, which thus explained may be called the Queen's donation, from that of the hospital proper. But if any such difficulty should arise, it ought to turn to the prejudice of the burgh, and not to that of the ministers. The council have chosen to blend together funds which ought to have been kept separate; and those who are interested in a portion of these funds, apart from the act, are entitled to have every intendment made in their favour, where that particular property upon which their rights attach cannot be distinguished.

Upon the view which I have thus taken, I do not think, that any grants or bequests which have been made to the hospital, whether generally or expressly for some particular objects, can be properly made to form any part of the foundation out of which the ministers' stipends are to be provided. But where purchases have been made from time to time out of the common funds received by the hospital master, the foundation ought to have the benefit of these acquisitions in the proportion which its revenues bear to those of the hospital estate. There may be great difficulty in ascertaining and distinguishing the property in this manner, but in no other modes in my judgment can justice be done between the parties. With respect to Monorgan's Croft, I agree with my noble and learned friend, LORD CRANWORTH, that it clearly appears, that an ascertained portion of the Johnstone legacy was invested in its purchase; and as the legacy was given for the yearly maintenance of the aged and impotent people of the town of Dundee, it is inapplicable to the stipends of the ministers. The second interlocutor must therefore be varied in this respect; and as to the interlocutors generally, I am of opinion, that they are correct in their findings, subject to the observation which I have made as to the ambiguity of the words, "very commonly known as the hospital fund," in the first interlocutor, and with the exception of the finding in the second interlocutor, that "the old hospital and its property fell within the scope of the general terms of Queen Mary's grant, and became part thereof;" but as my noble and learned friend differs with me as to my construction of the grant, his opinion must prevail.

Mr. Rolt.—I believe it will be necessary, in point of form, that the appeal generally should be dismissed, except as to the fourth finding in the second interlocutor. As to costs, it will be for your Lordships to say, whether they should be of the whole, or of the part of the appeal which is dismissed.

LORD CRANWORTH.—The first interlocutor will be affirmed, and the appeal dismissed with costs. As to the second interlocutor, the cause will be remitted with a declaration as to the Monorgan's Croft.

The following *order* was pronounced by the House of Lords:—

"Die Mercurii, 24^o Julii 1861.

"After hearing counsel," etc., "Ordered and adjudged by the Lords spiritual and temporal in parliament assembled. That the said interlocutor of the Lords of Session in Scotland of the Second Division of the 18th (signed 19th) of July 1856, complained of in the said appeal, be, and the same is hereby, affirmed, and that the said appeal, so far as relates to the said interlocutor, be, and the same is hereby, dismissed this House; and that the said interlocutor of the said Lords of Session of the Second Division of the 18th (signed 19th) of March 1858, also complained of in the said appeal, except so much thereof as 'Finds that the ground called Monorgan's Croft was purchased out of the accumulations and savings of the general funds of the

hospital, and belongs to the foundation,' and ' Finds that the hospital, at different times, received the whole legacy left by Robert Johnstone of London, amounting to £1000 sterling, to be employed by the Provost and Bailies of Dundee in the yearly maintenance of the aged and impotent people of the said town ; and that the annual interest of £1000 must be held applicable to that purpose in framing a final state of accounts ; and that, as to past administration, as the interest of that sum was to be strictly so appropriated, it must be held, that it was fully accounted for by the charities to which the funds generally of the foundation were applied,' be, and the same is hereby, also affirmed, with the declaration, that the ground, called Monorgan's Croft, must be deemed to have been purchased in the year 1646, with part of the legacy of £1000 bequeathed by the will of Robert Johnstone, in order that the same might thenceforth be held upon the trusts by the said will declared concerning the said legacy : And it is further ordered, that the appellants do pay, or cause to be paid, to the said respondents the costs incurred by them, in respect of so much of the said petition and appeal as stands dismissed as aforesaid, the amount thereof to be certified by the Clerk of the Parliaments : And it is further ordered, that the cause be remitted back to the Court of Session in Scotland, to do therein as shall be just and consistent with this declaration and this judgment : And it is also further ordered, that unless the costs certified as aforesaid shall be paid to the parties entitled to the same, within one calendar month from the date of the certificate thereof, the Court of Session in Scotland, or the Lord Ordinary officiating on the Bills during the vacation, shall issue such summary process or diligence for the recovery of such costs as shall be lawful and necessary.'"

For Appellants, Loch and Maclaurin, Solicitors, London ; Maclachlan, Ivory, and Rodger, W.S., Edinburgh.—*For Respondents*, Simson and Traill, Solicitors, London ; Edmund Baxter, W.S., Edinburgh.

JULY 19, 1861.

THE EARL OF FIFE and Others, his Trustees, *Appellants*, v. The Honourable GEORGE SKENE DUFF and Others, *Respondents*.

Entail—Registration—Statute 1685, c. 21—Deed without Executorial Clauses—*X purchased lands, and, while holding them on a personal title, executed in 1721 a deed of entail, containing, with power to revoke, the usual clauses of an entail, excepting procuratory of resignation, precept of sasine, and obligation to infest. Thereafter he made his right to the lands real, by titles containing no reference to the deed of 1721. He died leaving issue, two daughters, in a litigation between whom, it was determined by the Court, in 1725, that the deed of 1721 had not been revoked. The daughters thereafter made up titles, and were infest in the lands as heiresses-portioners ; and in 1728 they disposed the lands, in implement of the deed of 1721, to the oldest daughter of the entailer, as heiress of entail, and to the substitute heirs mentioned in the deed. The deed of 1728 contained a procuratory of resignation, in virtue of which it was feudalized, and became part of the progress of titles under which the lands were held down to 1860 ; but it was not registered in the Register of Entails. The deed of 1721 was registered. In an action at the instance of the heir of entail in possession against the substitutes :*

HELD, by the Court of Session, *That it was not necessary that the original deed of entail entering the register, should contain executorial clauses making it capable of feudalization ; that the requirements of the Statute, 1685, c. 21, were satisfied by the deed of 1721 having been recorded ; and that the entail of the lands was not rendered void by the deed of 1728 not having been recorded.*

*Cause remitted by House of Lords on appeal, to be heard by the whole Judges of the Court of Session.*¹

This action of declarator was brought for the purpose of having it found, that the lands of Carraldston and others belonged to the Earl of Fife (and his trustees) in fee simple, and that a sale to Mr. Lauderdale Maitland was a valid and effectual sale. The defenders are the substitute heirs of an entail of the lands, under which they maintained, that they could not be alienated.

The lands of Carraldston were purchased in August 1721 from Mr. Stewart of Grandtully by

¹ See previous report 23 D. 657 : 33 Sc. Jur. 321. S. C. 4 Macq. Ap. 469 ; 33 Sc. Jur. 714. See also sequel of this case, *post*, 27 March 1863.