maintained they had acquired from Halliburton and Chisholm in security of certain wool shipments; while Mr Dall, Chisholm's trustee, claimed the fund on the ground that the goods were bought by Chisholm from Mitchell & Company, as an individual and not as an agent, and sold in Australia by Halliburton for Chisholm's behoof.

An objection having been taken to the relevancy of Mitchell & Company's claim, on the ground that Halliburton was not a claimant in the process, the Lord Ordinary (BARCAPLE) pronounced the following interlocutor:—"The Lord Ordinary having heard counsel for the parties, and considered closed record in the competition, Finds that the facts averred on record by the claimants James Mitchell & Company are not relevant to support their claim to any extent: Repels the claim of the said James Mitchell & Company, and decerns: Finds them liable to the other claimants, Thomas Dall and Willans, Overbury, & Company, in the expenses of answering and discussing the claim of the said James Mitchell & Company: Allows accounts thereof to be given in, and remits the same when lodged to the auditor to tax and report; and appoints the cause to be enrolled that the competition, as between the said Thomas Dall and Willans, Overbury, & Company, may be proceeded with.

"*Note.*—The argument was limited to the claim of Mitchell & Company, which the other claimants concurred in maintaining to be wholly irrelevant. The Lord Ordinary is of opinion they are well founded in the contention.

"The claim of Mitchell & Company is rested upon two distinct grounds—*First*, They claim to be ranked preferably on the fund *in medio* to the extent of £345, 14s., on the ground that, to that extent, the fund consists of the price for which goods sold by them to Mr Halliburton in Australia were sold by or for behoof of that gentleman on his own account in the colony. But, assuming the facts to be as stated by the claimants, the sale and delivery of goods by them to Mr Halliburton could only give them right to demand payment of the price for which they sold them to him. It could not give them any right to reclaim the goods or the price realised for them by the purchaser, either as a *surrogatum* for the goods or on any other footing. *Secondly*, Mitchell & Company claim to be ranked upon the fund *in medio* simply as general creditors of Mr Halliburton for the price of the goods above referred to, and for other sums. The fund is admittedly money which was remitted by, or by order of, Mr Halliburton to this country, and has been consigned in the City of Glasgow Bank. It is claimed by Dall, Chisholm's trustee, as being the price of goods belonging to Chisholm, and sold on his account by Halliburton. It is also claimed by Willans, Overbury, & Company, in respect of an alleged security transaction in their favour. It is not claimed in any way by Halliburton, who has not appeared, and has lodged no interest in this process. In this state of matters there is no room for the second branch of Mitchell & Company's claim, which they could only have maintained through Halliburton, and as a riding interest upon his claim, if he had lodged one. If the transaction by which the fund was consigned in bank is liable to objection at the instance of Mitchell & Company, or other creditors of Halliburton, the objection would require to be insisted in otherwise than by lodging a claim in the multiplepoinding."

Mitchell & Company, after making certain additions to the record, to show the nature of the consignation, reclaimed against this interlocutor.

M'KIE for reclaimers.

SHAND and RETTIE for Willans, Overbury, & Company.

J. MARSHALL for Dall.

The Court, being of opinion that there was no ground for holding Mitchell & Company's claim to be irrelevant any more than that of the other claimants, unanimously recalled the Lord Ordinary's interlocutor, and remitted the case to him to allow the parties a proof of their averments.

Agents for Reclaimers—Goldie & Dove, W.S.

Agent for Willans, Overbury, & Company—H. Buchan, S.S.C.

Agents for Dall—J. & H. G. Gibson, W.S.

HOUSE OF LORDS.

Friday, January 26.

CLEPHANE AND OTHERS *v.* MAGISTRATES OF EDINBURGH.

(Vol. iii, p. 84.)

Charitable Trust—Hospital—Obligation. Circumstances in which *held*, in applying a previous judgment of the House of Lords, that a sum of £7000, but not interest accruing thereon, was to be applied in building a certain church; and that it was not necessary to rebuild a hospital which had been demolished through railway operations, the purposes of the charity being sufficiently fulfilled by administration of outdoor relief.

The action in which the present appeal was taken was instituted in the year 1856, in the name of certain poor persons, beneficiaries or pensioners of the charity known as the Trinity Hospital of Edinburgh, the administration of which is vested by Crown Charters in the Corporation of the City of Edinburgh. The object of the action was to obtain from the Court of Session a decree, finding and declaring that the sum of £17,171, 9s. 6d., received by the respondents from the North British Railway Company as compensation for the compulsory sale of the Trinity College Church of Edinburgh, formed part of the trust-estate vested in the Corporation for behoof of the said charity, and that the money was applicable to the purposes of the charity. The Corporation were about the same time called as defenders in another action, instituted by a minority of its members in conjunction with other individuals, for the purpose of having it declared that the whole of the above mentioned sum was applicable to the purpose of building a church similar in style and model to the ancient Trinity College Church, which, as already mentioned, had been acquired by the North British Railway Company for the purposes of their undertaking. The Corporation, acting upon the advice of counsel, had, previous to the institution of these actions, come to the resolution of applying the sum of £7000, part of the money in question, in building a suitable church, in which, without aiming at reproducing the architectural style or embellishments of the ancient edifice, they should be able to provide sufficient accommodation for the pensioners of the Hospital, and for those inhabitants of the district who had been accustomed to worship in the Hospital Church. The balance (including all in-

terest and casual receipts accruing to the fund) the Corporation had in like manner resolved to apply to the general purposes of the charity. This resolution they were prevented from carrying into execution in consequence of the judgment originally pronounced by the Court of Session, whereby the whole fund was declared to be applicable to the object of rebuilding the Trinity College Church, according to its original style and model. But, on appeal to the House of Lords, the resolutions of the Corporation were sustained; and it was held in substance that, although the Trinity College Church was the property of the charity, yet that, regard being had to the usage of celebrating public worship therein from the commencement of the charitable foundation, the Corporation, as trustees of the charity, could not take the price discharged from the obligation of providing a place of public worship. According to the judgment of the House, a sum of money, not exceeding £7000, was appropriated to the purpose of building a church; and the Court of Session was directed to make inquiry as to the purposes and administration of the charity, and to give the necessary directions as to the application of the residue.

When the case went back to the Court of Session, the judgment of the House was formally applied, and the Corporation was appointed to give in a minute furnishing the information required by that judgment. To the minute given to the First Division of the Court, in obedience to their requirement, answers were lodged on behalf of the pensioners. The parties were heard upon the minute and answers, and an interlocutor was pronounced on 7th December 1866, which was the subject of the present appeal.

Three of the points disposed of by the interlocutor of 7th December 1866 are involved in the present appeal.—(1) It is found that the funds to be employed in the purchase of a site for, and in building the church, shall consist of £7000, of the sum received from the North British Railway Company, "with the interest and accumulations thereof which have accrued, or shall hereafter accrue, to the defenders, on the said sum of £7000, under deduction of such sums as have been, or shall be, paid by them in the meantime for providing accommodation for the said congregation." (2) It is found that it is not necessary or expedient that the defenders should rebuild the Hospital which belonged to the charity, and which was also removed by the Railway Company. (3) The objections stated on behalf of the pensioners to the states of the funds of the charity, given in by the defenders, are disposed of by superseding the consideration thereof in the meantime. A finding, dismissing a claim made by the University of Edinburgh to participate in the distribution of the fund, has been acquiesced in, or at least is not the subject of appeal.

ANDERSON, Q.C., and WOTHERSPOON for appellant.

SIR ROUNDELL PALMER, Q.C., for respondents.

At advising—

LORD CHANCELLOR—My Lords, we are asked, upon the present occasion to reverse an interlocutor of the Court of Session, pronounced in the month of December 1866. It appears that this unfortunate charity (for so I must denominate it) received, in consequence of the purchase of part of its property by a railway company, a sum of £17,000 nearly twenty-one years ago—I think in the month of May 1848. Then a course of procedure has taken place, by which, instead of dealing with this £17,000 for the purposes and objects of the charity, a vast amount of expense has been incurred;—the objects of the charity have been to a certain extent (and, perhaps, to a certain extent only) disregarded, whilst a contest has been going on between the Provost and Corporation of Edinburgh and those persons who are interested in the charity, as to the exact mode in which this £17,000 shall be disposed of. The matter, however, came before your Lordships' House exactly five years ago, and the decision of your Lordships was pronounced in the month of February 1864. It was to be hoped that the decision to which this House came, and the order which was very carefully penned upon that occasion, for the purpose of preventing all further dispute and litigation might have had that beneficial effect. However, unfortunately it appears to have been far otherwise; and now, in this fifth year since that order was pronounced, we are again called upon to decide in a conflict which a little good humour, joined to the great amount of intelligence which I have no doubt is possessed by the parties, might have prevented, and so an end might have been put at once to this controversy; and there might have been long since built in Edinburgh the church which your Lordships' House desired should be erected, and the rest of the fund might have been simply appropriated towards the objects of the charity.

Now, the order of your Lordships (which is to be found at page 42 of appellants' case) being this, that a sum not exceeding £7000 should be appropriated to the erection of a church on the site of that which had been removed; and your Lordships having plainly declared what the exact position of the parties was with reference to the property which had been taken, by saying that the church when so erected, at the expense of £7000, should be appropriated for the benefit of those who were receiving the advantages of the charity; and that, subject to that, it should also be appropriated for the benefit of those who, for many years previous to this litigation arising, had had the use of the church as residents in Edinburgh; and that, after erecting the church at an expense not exceeding £7000, which would be sufficient for the purposes indicated, the residue should be appropriated for the benefit of the charity, the House proceeded to direct inquiries before the Court in Scotland, which inquiries involved, amongst other things, this direction, which is contained in page 42 of the appellants' case, 'That all the residue of the money received from the said Railway Company, and all interest thereon, and all the rest of the property of the said Hospital, is applicable to the enlargement and maintenance of the charity, as declared and established by the charters, dated respectively the 12th of November 1567 and the 26th of May 1587, in the 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.'

Now, I should have thought that it was plain and intelligible to every mind to which the words which I have read should be presented, and therefore to the appellants, that it was intended that a proper scheme and arrangement should be submitted to the Court in Scotland for the administration of the funds, and that such proper scheme, if it should be deemed necessary, but not otherwise, should include the erection of an hospital; and that therefore it was remitted to those who

had to consider the case when brought before them in a proper manner, by the submission of a scheme, to decide whether or not they in their judgment deemed the erection of an hospital necessary. If so, the whole of the learned argument to which we have this day listened is an argument addressed to us for the purpose of asking us to do that which it is impossible for us to do, namely, to reverse the decision previously come to by your Lordships' House in the year 1864. Because it appears to me that the argument which has been used is, that it is open to us now to say that, although it has been deemed unnecessary by those to whom the question has been referred that the Hospital should be erected, yet we must hold not only that it is necessary, but that it was impossible for your Lordships, or for any other tribunal whatever, to exercise any discretion on the subject. That is the argument which has been addressed to us, and authorities have been cited to prove to us that we cannot alter, and that no one but the Legislature can alter, the provisions which it is alleged were made by the original charter, by making any use of these funds until the Hospital be first erected as a substantial building.

There one, perhaps, might stop, for really the whole case seems to turn upon that single point. But I think that it is due to your Lordships' House to say that it does not appear to me that any error existed in the conclusion which was so come to. For what, after all, is the true object, purport, and intent of this charter with which we have to deal? The charter contains the following recital:—"Know ye us and our dearest cousin James, Earl of Murray, Regent of our kingdom, moved by fervent and zealous purpose to support and assist the poverty, penury, and want of many, and diverse aged and impotent persons, who, in their old age, have lost their means and estates, by and through the events of adverse fortune, so that they may not perish and die through extreme hunger, penury, and want of necessary sustenance, and therefore moved by piety and good conscience to afford them such help and assistance as their want and need require; as also understanding that this purpose cannot be properly carried into effect without our supplement and authority." That indicates the motive on the part of the Crown. The motive there is simply sustaining the poverty, penury, and want of those persons who are so afflicted, in order "that they might not perish and die through extreme hunger, penury, and want of necessary sustenance." And then, as regards Sir Simon Preston, to whom the grant is made by the Crown, it proceeds to state what his object was, namely, "That Sir Simon Preston has the intention and deliberate, firm, and set purpose to build, found, and, with all care and diligence, endow an Hospital, with reasonable support, for such foresaid honest poor and impotent persons, aged and sick, indwellers and inhabitants within our Burgh of Edinburgh, and also for such other old, impotent, and indigent people, as shall be found fit objects for receiving such benefits and charity in the said Hospital so to be founded." Then it proceeds to say, that in order to set the example to the subjects of good works, the Crown grants this property, which is vacant in its hands, "and at our gift and disposal as shall be most fit and convenient for building, erecting, repairing, and performing the said Hospital with houses, biggings, and yards thereof, where there seems to be the greatest concourse and passage of people, as well strangers as townsmen, by whose daily alms the said Hospital may be benefited." Then the Crown proceeds to grant the Church, called the Collegiate Church of the Trinity, with all the buildings belonging to it; and the grant is expressed to be "for the building and construction of the said Hospital, houses, yards, and policies thereof, for the maintenance of the poor and sick, to be placed by them therein only, and for no other use."

Now, I apprehend that the real scope and scheme of the whole of that charter was this, that the primary and leading object, first of the Crown and then of Sir Simon Preston, was the relief of the poor and distressed, and providing for the necessities of the aged, and impotent, and infirm; and that, finding a place where he could conveniently erect a building for that object, he obtained from the Crown a grant to enable him to carry that primary object into effect, by the erection of a suitable building or hospital. It is not what is ordinarily found in foundations of hospitals as such. It is not a scheme by which anything in the shape of a permanent building, and a permanent staff thereto attached, or the constant continuance of the building for the purposes here described, is suggested. Nothing of that kind appears in the grant. There is no provision for a governor, or a master, or matron, or nurses, or chaplain—there is not one of those provisions, and the grant does not seem to indicate anything more than what I have described, namely, that the mind of the Crown is set, and that the mind of Sir Simon Preston is set, upon doing all that can be done for persons in this infirm and unhappy condition. And that which appears to have presented itself to the mind, both of the Crown and of Sir Simon Preston, was this:—Here is a place which will assist us in carrying this work into effect, here we can erect a building, and here can place the poor, and sick, and infirm.

Now, what happened was this, time after time the building was in a bad state of repair, and at one time it appears to have become almost ruinous. At one time there seems to have been a charter granted which stated that the building might be taken down and disposed of by the Corporation in such a manner as was thought most useful, and they thought it most useful to rebuild it. I refer to that passage, which is to be found in the condescendence of the appellants, simply for the purpose of shewing that the original intent, and purpose, and scheme of the whole charity were such as I have described, and that it was not a charity for which it was essential that a building should be provided, which should be always attached to the Charity, or one with regard to which any provision was made for continuing it in the shape of a hospital to be governed by rules, ordinances, and regulations, such as those to which I have referred, and such as you find in the constitution of ordinary hospitals founded for the special purpose of their being continued in perpetuity, under the terms of the grant.

Now, that being so, What do we find in point of practice has occurred? We find that, for more than eighty years, the course has been (and it appears to me not inconsistent with the objects either of the founder or of the Crown) to afford relief to the distressed objects mentioned in the grant, outside the walls of the building. It seems to have been thought that the existence of a substantial edifice formed no necessary part whatever of the objects of the founders. Since the year 1846 or 1847, when

the Hospital was taken down by the Railway Company, the charity has continued to be wholly administered in that manner. The sick, the aged, and the poor have been relieved in a different manner from that prescribed by the charter. And so your Lordships appear to have thought it might possibly be administered hereafter, that the house was not inflexibly bound by the charter to administer it through the medium of residence within the four walls of the building, but that it was right and reasonable that a judgment should be exercised by competent authority upon that subject, and that it was open to such authority to exercise a judgment upon it. That conclusion having been come to, your Lordships' House left it to the adjudication of those to whom the whole scheme was to be submitted, and I apprehend that that being so, no rule of law was transgressed, and I am happy to think that the case was such, because, had there even been, in our judgment, anything in that decision which militated against any previous rule of law, it would undoubtedly not be competent to us at the present moment, without having that case reheard (if such a thing was possible), to reverse that decision.

My Lords, the only remaining question to which I need advert is this. It is said, If it be not necessary to erect the Hospital, why erect the Church? There again we are undoubtedly precluded by the order of the House pronounced on the former occasion. But even if we were not so precluded, I do not at all admit the justice of that argument. Many of those persons who are relieved by means of this charity may be residing in the neighbourhood. There is no reason why it should not be so, and the probability is that many of them would have their residence in the neighbourhood of this church, and many of them, therefore, would be partakers of the benefit which the decree of this House was intended to secure to them.

The only remaining point which occurred in the argument was the point with reference to the objections which were taken to the "States" brought in before the Court. It appears to me, I confess, that there is nothing whatever of which the appellants are entitled to complain in that respect. The only important item which they might have some ground hereafter for disputing (if the parties have not the good sense, which I trust they will have, to arrange all these matters in the manner in which charities, above all things, should be arranged), is under the 12th objection, which was raised with reference to certain expenditure incurred on account of plans and surveys, and other matters of that description, in connection with the church. That is expressly reserved by the interlocutor complained of. We have, therefore, nothing to do with that part of the case; and, with regard to the other objections, I see nothing of substance in them. The only alteration which appears to me necessary to be made is with regard to what has already been suggested by one of your Lordships, namely, the omission of the interest which accrued on the £7000, as being the sum properly applied to the erection of a church, because it is quite clear that by the order made upon the former occasion, £7000 was appointed as the maximum. There was no question of the interest which might arise upon the £7000, but whenever the church is built no more than £7000 is to be expended upon it, and it may be that not so much is necessary; at all events, no more can be expended. I would therefore, upon that point, propose to your Lordships, after the words £7000 in the second finding, to add the words "if so much be required."

Then with regard to costs, in substance the appellants entirely fail in the present appeal, and the costs must follow. The appellants sue as paupers, and of course, as far as they are concerned, they will pay no costs. The House will not make any order with reference to the payment of costs by them. But it appears to me that, with your Lordships' sanction, no costs ought to be allowed to them in this appeal. With regard to the respondents, I confess that, after what we have heard, and especially after what has last fallen from Mr Anderson, namely, that although there was a suggestion that the question of interest should be waived, in order that fewer points might arise for argument, it was distinctly stated that it would make no difference whatever in the appeal being prosecuted, it seems to me that the respondents are entitled to have their costs out of the charity. Therefore, what I should propose to your Lordships would be to affirm the decree, with the variation which I have suggested, to grant no costs to the appellants, and to direct that the costs of the respondents should be paid out of the charity estate.

Lord Chelmsford—My Lords, with reference to the argument on behalf of the appellants, the only question to be determined is, whether the Magistrates of Edinburgh were bound to erect a new building, to be used as a hospital, in the place of that which was taken down to make room for the railway. This question depends upon the effect of the charter, and upon whether it fastens on the Magistrates of Edinburgh an irrevocable trust that there shall always be a building to be used as a hospital to the end of time.

Now, the primary object of the charter of James VI. in 1567, as my noble and learned friend on the Woolsack has pointed out, was the help and assistance of aged and impotent persons. There was no recital in the charter that for that purpose it was necessary to build and endow a hospital, but all that is said is, "Understanding that this purpose cannot be properly carried into effect without our supplement and authority;" and then it goes on to recite that Sir Simon Preston has expressed his intention "to build, found, and endow a Hospital with reasonable support for such foresaid honest poor and impotent persons." Then there is a grant to the Magistrates of Edinburgh for the building and construction of the Hospital "for the maintenance of the poor and sick to be placed by them therein only and for no other use," with a proviso "that they shall be bound to apply the places and others foresaid to the foresaid use and no other." Now I understand by that merely this, that as long as the building remains it shall be used for the purpose of a Hospital, and for no other use or purpose, and not that there shall always be a building to be applied to the purposes of the charter.

That it was not necessary that a building should always exist for this purpose appears to me to be clear upon the words of the charter of the 26th of May 1587, which authorised the Magistrates to apply the old Hospital buildings, which had become ruinous, to whatever profitable use might seem expedient; and there is no direction whatever that, if the ruinous building is taken down, another shall be erected in its place.

Now, if the effect of the charter was, that the Magistrates should always maintain a Hospital for the reception of poor persons, there certainly was

great difficulty in justifying the former order of this House, leaving the question of the re-erection of a Hospital to depend upon whether it should be deemed necessary. But no necessity for the continuance of a building as a Hospital for ever can be deduced from the charters. This seems to me to be conceded by the appellants themselves; for in one of their condescendences, namely, condescendence 25, they say, "In consequence of the building of the Hospital having been removed by the railway company, and of no new hospital buildings having been yet erected, there was no inmates or poor persons supported or maintained in any one building or hospital at present, but instead, pensions, in weekly, monthly, or termly payments, are granted to the pursuers and to a great many other poor persons. In the event of a new hospital being erected, the pursuers, or some of them, would be entitled to be received as inmates thereof." They therefore state it as a contingency, whether a new hospital will be erected or not. If the erection of a new hospital had been absolutely necessary, their words would have been, "When a new hospital is erected, the pursuers, or some of them, will be entitled to be received as inmates thereof."

This being so, the order of the House upon the former occasion was perfectly correct. It was justified by the conditions of the charters, and it is in itself conclusive of this question, because, after providing £7000 for the church, it is declared "that all the residue of the money received from the said railway company, and all interest thereon, and all 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 of November 1567 and the 26th of 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 Court of Session to settle and approve of such scheme accordingly."

The Court of Session by their interlocutor applied that judgment; and they directed, among other things, that a statement of the monies which belonged to the property of which the hospital consisted should be made; and also that within four weeks the parties should lodge a scheme showing the proposed application of "the said properties and funds." In pursuance of that interlocutor, a scheme was accordingly proposed by the Trustees of the Hospital, and submitted to the Court of Session, and in that scheme there is the following statement—"The trustees beg to state, that in their opinion it is unnecessary and inexpedient that a new Hospital should be built. It appears to them that the funds under their management would be more beneficially applied by continuing the outdoor system of relief." Upon this the Court of Session pronounced their interlocutor, finding "that it is not necessary or expedient that the defenders should rebuild the Hospital which belonged to the said charity, and which also has been removed by the said railway company." And against that interlocutor this appeal is made.

I think that I have shown your Lordships sufficiently, that the order which was made by the House upon the previous occasion was well founded, and that there is no objection to it with reference to any restrictive words in the charter. I therefore entirely agree with my noble and learned friend upon the Woolsack, that this interlocutor must be affirmed. I also agree with him with regard to the alteration which he has suggested, and likewise upon the subject of the costs.

LORD WESTBURY—My Lords, I should hardly feel it necessary to add a word to what has been addressed to your Lordships, but for some observations which fell from the appellants' counsel, and which seemed to show that this subject of the administration of charitable trusts is not yet perfectly apprehended. My Lords, the jurisdiction of the Court of Session, and jurisdiction of a Court of Equity in England, upon the subject of the administration of charitable trusts are one and the same. Undoubtedly, in England we have had a greater number of cases, and therefore the principles have been more fully developed. The rules which have been laid down and the authorities in England are of course not binding upon the Court of Session. Yet, as they are illustrations of the convenient mode of the application of the same principles of law, I dare say that whenever an opportunity arises the Court of Session will deem them entitled to great respect and attention.

Now, in both Courts this principle has prevailed, namely, that there shall be a very enlarged administration of charitable trusts. You look to the charity which is intended to be created, that is to say, the benefit of the beneficiary, and you distinguish between the charity and the means which are directed to the attainment of that charity. Now the means of necessity vary from age to age. Take a charity consisting, as it does here, of the relief of the poor. The condition of the country or the condition of the town at the time when that charity was created, may have dictated what were at that time very convenient means for the application of the particular charity. In the progress of society, and with the greater diffusion of wealth and the growth of population, the means originally indicated may become inadequate to the end. And the Courts of Equity have always exercised the power of varying the means of carrying out the charity from time to time, according as by that variation they can secure more effectually the great object of the charity, namely, the benefit of the beneficiary.

Now, it is perfectly true that you cannot substitute one charity for another. You may substitute for a particular charity, which has been defined and which has failed, another charity *ejusdem generis*, or which approaches it in its nature and character; but it is quite true that you cannot take a charity which was intended for one purpose and apply it altogether to a different purpose. Some instances occur in our English Reports upon the subject, but on an examination it will be found that what was done in those cases was not done under the ordinary authority of the Court of Equity, but that it was done in cases where the charity described failed by reason of its illegality, and where it fell to the Crown to declare what should be the form of administration to be adopted. I mention this because our attention has been directed to the language which was used by Lord Eldon in the case of the *Attorney-General* v. *Mansfield*. That language was never intended at all to alter the law upon this subject, namely, that the means for the attainment of the end may be altered from time to time. Neither was that language intended to interfere with the settled doctrine of what is called *cy pres* application in a Court of Equity. But it was intended only to apply to such a case as

this. Supposing that an attempt is made to take a charity given for the relief of the poor in a particular district, and to apply the money so dedicated for the purpose of building a bridge, or making a road, or draining a town, those objects being quite *diversi generis* from the objects for which the charity was given, probably those objects would not come within the powers of a Court of Equity. But the power of a Court of Equity to alter the means so as to adopt them to the end is undoubtedly not limited.

Now, what is the case which we have to consider here? The benevolence of Sir Simon Preston, and of the Crown acting at his instance, was moved on account of the condition of the poor of Edinburgh; and, as one means of benefiting the condition of the poor, he was enabled to erect, and had land granted to him, upon which he might erect dwellings for the poor; for, although you call it a "hospital," yet the word "hospital" is to be considered wlth reference to that which is here described; and you must not derive from the word "hospital" the idea which is frequently attached to it at the present day, namely a particular building, with a certain staff of officers, and with directions to receive inmates therein, and to allow them certain sums of money, and to keep up a number of officers, a chaplain, and a superintendent, and so on, who are directed to be maintained in the hospital. That is a hospital, consisting of a certain definite number of recipients of charity, whose interest in the charity is defined, and the hospital is to be for them a place of permanent dwelling. But in the direction here given for the establishment of a hospital, there is nothing more, so far as the charters go, than, as it were, the erection of an ordinary poorhouse, where the poor and the sick may be received, and lodged, and maintained, so long as may be necessary; and the whole seems to be left entirely to the *arbitrium* and the discretion of the superintending authority by the founder of the charity.

Now, these buildings, such as they were, have been swept away, under the authority of the law, by a railway company; and there is substituted for the buildings a large sum of money. Where is the necessity that that sum of money, constituting the property of the charity, should be dedicated to the use and service of the poor in the same manner as that in which, at the time of the foundation of the charity, it was considered that the end of relieving the poor might be best accomplished? If the end of relieving the poor can be better accomplished now by hiring dwellings for them, or by enabling them to get lodgings, or cottages, or dwellings of their own, the substantial object will be accomplished; and, of course, it is palpable to every one, that if we allow, for example, the laying out of £10,000 in the erection of suitable buildings for the reception of the poor, the interest of that money will be so much money taken away from the number of pensions which might be given in outdoor relief. Whether it should be the one or whether it should be the other, depends on the circumstances of the time, and on what constitutes a wise, and prudent, and discreet administration of the funds of the charity. And that administration may alter. It does not follow that, because we approve of outdoor relief to-day, the scheme continuing that form of application should have perpetual duration. Another set of circumstances may arise, ten, twenty, or fifty years hence, which will suggest another and a more beneficial form of administration. And thus it is that charity, in the eye of the Court, is not bound up to any obsolete and no longer beneficial mode of administration, but it may receive, under these wise maxims, from time to time that application and that administration of the fund, which will best accomplish the great end in view.

I therefore think that these considerations would justify to the mind, not only of every lawyer, but, I should hope, of every wise man who was really intent upon works of benevolence, the sort of order which was made by this House. The House undoubtedly saw no legal obligation for the erection of a building, or for the maintenance of a building; and it, therefore, only regarded the building as something suggested at that time with a view to an end. Whether there should be another building or not, was left to the wise discretion of those who were armed with the power of administering this charity; and it was accordingly settled deliberately by this house, that if they deemed a hospital necessary, a new hospital should be built, but that if they deemed the building of a new hospital unnecessary for the benefit of the poor, then there was no obligation to erect such a building.

Now, the appellants have neither here nor in the Court of Session presented any considerations, or any peculiar circumstances, or any facts, upon which the Court of Session would have been warranted in coming to the conclusion that it was necessary to build an hospital. What, then, have we here? We have an administration which has been exclusively directed to outdoor relief for the last twenty-one years, and an administration which has consisted, as to the greater portion of the funds, in outdoor relief since 1785. Then, what is there to justify our departing from all that has been done, altering the course which we find to have existed, and directing so much of the funds of this charity to be laid out in what would probably be found to be a wasteful and useless form of application.

If these things had been considered as I think they ought to have been considered below, I think we should not have observed the strange spectacle of an appeal brought here in the hopeless attempt to alter the order of the House, and I think that we might have been spared observations which were directed to show that the order of the House was inconsistent with law and with justice. My Lords, I have dwelt so much upon this point, not because I felt that the order of your Lordships' House required to be vindicated, but only to repeat the considerations which were present to the minds of my noble and learned friends, who with me heard the former appeal, and to my own mind, when that order was pronounced.

My Lords, there is nothing else, I think, which remains to be said, except with regard to the variation which is proposed to be made in the interlocutor appealed from. It is quite true that words have crept into the interlocutor which have proceeded upon a misunderstanding of a portion of your Lordship's order. It is unnecessary to show how clear the language of that order was, and that it ought not to have been misunderstood, because the respondents very handsomely say that it was a misunderstanding of the order, and they desire to have deleted from the order so much of the language as contains that misunderstanding. It thus becomes requisite to add to the words '£7000' in the passage which has been referred to the words 'if so much be required,' and then to delete the words which follow in italics.

With respect to the rest of the appeal, the indignation and complaint against the charges relating to plans are answered at once by this, that there is an inquiry which is not yet exhausted. There will probably be very important questions arising upon that portion of the objections, but we of course do not deal with matters which are reserved by the Court of Session for further consideration.

My Lords, I entirely concur with my noble and learned friend on the Woolsack as to the manner in which he proposes to your Lordships to dispose of the costs. If, indeed, this appeal had been directed only to the erroneous part of the interlocutor, then I should have required the respondents to show that they had been willing to abandon that erroneous part. But when they were told that whether they did it or not the appeal would go forward, I think that the respondents acted with great propriety in telling the appellants, We do not mean to maintain that part of the order, and if you intend to bring it before the House of Lords, it is more becoming that it should be expunged by the authority of the House than that we should make any application to the Court of Session to alter the judgment which has been pronounced. I therefore think that the respondents are entitled to their costs. But I hope and trust that this is the last that we shall hear of this matter; and I rejoice the more that we can with perfect justice refuse to the appellants their costs, because I think that it will be one of the most effective and most salutary modes of preventing further litigation. Let that be remembered, because without it I feel certain that if hereafter there were a peg upon which an appeal could be hung, we should have that appeal brought here. Probably this matter will not be any longer a subject of litigation in this House, when the parties find that they cannot look with anything like confidence to the costs coming out of the fund.

Lord Colonsay—My Lords, as to the question whether or not another building should be erected as an hospital, the matters for consideration in the Court below appear to have been, first, whether they rightly understood the judgment or deliverance of your Lordships as having dealt with that question; and, secondly, whether, if they rightly understood it as having dealt with that question, and having left it to the discretion of those who had the management of the charity, there has been anything advanced to show that that discretion has been ill used. Now, my Lords, upon both these points I think that the case is clear. I think it very clear from reading the judgment or deliverance of this House in 1864, that the House did deal, and did intend to deal, with the question, whether or not an hospital building should be erected, and that the House dealt with it by leaving it to the discretion of those who had the management of the charity to determine whether it was expedient or necessary that such a building should be erected. Those parties having come to the conclusion that it was not necessary, and that it was not expedient to erect an hospital, but that it was more expedient and more fitting that the relief should be given to the objects of it out of doors, and nothing having been urged here as matter of discretion against that decision, I think that we have no course now but to affirm the judgment of the House and of the Court below in that matter. If it had been open to us now to go into the question whether the charters which have been read made it absolutely necessary that a hospital should be erected, and precluded all discretion under all circumstances, we might have had a different course of proceeding to follow out. But as far as I have been able to judge from the argument which has been submitted to us, I see no reason to doubt that the deliverance of this House in 1864 was perfectly in accordance with the principle and with the tenor of these charters.

But there is another point in this case, as to the sum which was intended to be applied to the building of a church. I have no doubt now, after hearing what your Lordships who took part in the proceedings in 1864 have said, that the Court below have misread the judgment or deliverance of the House upon that matter. They have interpreted it in a sense in which it was not intended to be interpreted, and, therefore, the alteration which has been suggested in the judgment of the Court below must be made, and the amount of money to be applied to the erection of a church must be limited to the sum of £7000. I hope, however, that with regard to that matter there will be no further delay in carrying out the direction of the House or of the Court below. As long as that matter is delayed, that sum, whatever it may be, which ought long ago to have been applied to the erection of a church, is lying accumulating for the benefit, as it is said, of the charity, but to the detriment of those who are to have the benefit of the church. I hope, therefore, that no farther impediment will be interposed to the application of that fund to the purpose to which it has been directed to be applied.

As to the notion that if there is to be no building of a hospital there is to be no church, I think that I must regard that as more ingenious than sound. I cannot go along with the notion that no parties are to have benefit from the church accommodation except the parties who reside within the building of the Hospital, and those parties residing in the neighbourhood of the church who are recipients of the fund. I think that, under the interpretation which has been put upon the charters, the recipients of this charity are the parties who are primarily entitled to the benefit of accommodation in that church, and that when the judgment of the Court below used the expression 'beneficiaries,' it used it properly, seeing that, in the view which that Court took, and in the view which this House has taken, there were to be no inmates. It did not follow from that that the beneficiaries of the charity are to be deprived of church accommodation. They are entitled to have it. And then, further, accommodation is to be given to the parties residing in the neighbourhood.

As to to the matter of costs, I entirely concur in what has been suggested by my noble and learned friends.

The Lord Chancellor put the questions as follows;—

That the interlocutor complained of be affirmed, with the following variations, that is to say, by inserting in the second finding the words, "if so much be required" after the words "£7000," where they first occur in that finding, and by omitting in the same finding all the words that follow the word "church."

And That the appellants neither receive nor pay costs of this appeal. And that the costs of the respondents be retained by them out of the charity estate.

And the same was resolved in the affirmative.

Agent for Appellants—W. Wotherspoon, S.S.C.

Agents for Respondents—W. W. Millar, S.S.C., and John Graham, Westminster.

Thursday, February 28.

LORD ADVOCATE *v.* STEVENSON.
(4 Macph. 322.)

Succession-Duty—16 *and* 17 *Vict.* c. 51. The interest in heritage acquired by a successor who dies before making up titles, and so shortly after the predecessor's death as to derive no beneficial possession or other benefit, is not a beneficial interest either in possession or in expectancy, and hence is not a "succession" in the sense of the Succession Duties Act, by which succession duty is payable.

This was an appeal against a judgment of the Second Division of the Court in a special case presented for opinion in an Exchequer cause.

"1. On the 5th June 1862, Miss Janet Rebecca Finlay of Musselburgh died intestate, infeft in fee-simple in a dwelling-house, consisting of a flat and pertinents, in Duncan Street, Drummond Place, Edinburgh.

"2. The said Janet Rebecca Finlay was survived by a younger and only sister, Miss Williamina Rutherfurd Finlay, who was her heir-at-law.

"3. The heir in heritage of the said Janet Rebecca Finlay and of the said Williamina Rutherfurd Finlay is the defendant, Mr Walter Stevenson, the grandnephew of George Finlay, father of these two sisters.

"4. Miss Williamina Rutherfurd Finlay died on 22d September 1862 without having made up a title to the said dwelling-house.

"5. Three days before her death, and on the 19th September 1862, the said Williamina Rutherfurd Finlay executed a last will and settlement, whereby she named as her executor John Clunie, Esq. of Beaufort House, Stapleton, near Bristol, and disponed to him all and sundry lands and heritages belonging to her, or to which she might have right and title, and generally her whole heritable property, including the said house in Duncan Street, Edinburgh. The said deed was executed upon deathbed, and is admittedly ineffectual in law, as a conveyance of the said dwelling-house.

"6. After the death of Miss Williamina Rutherfurd Finlay, the said Walter Stevenson made up a title to the said dwelling-house, as nearest and lawful heir to Miss Janet Rebecca Finlay, in which character he obtained a writ of *clare constat* from the superiors, the magistrates of the city of Edinburgh, dated 9th December 1862, which was duly recorded in the Register of Sasines for the shire of Edinburgh.

"7. The rent of the said dwelling-house for the half-year from Whitsunday to Martinmas 1862, during the currency of which both sisters died, was personal property belonging to Janet Rebecca Finlay.

"8. The said Walter Stevenson entered to the beneficial enjoyment of the house in Duncan Street at Martinmas 1862, and at Whitsunday 1863 he received payment of the rent then due for the preceeding half-year. After the expiration of a year from that date, he lodged in the Inland Revenue Office in Edinburgh the proper schedule for settling the two first half-yearly instalments of duty payable to him, as successor to the heritable estate of Miss Janet Rebecca Finlay; and in December 1863 he paid, as the amount of the said two first instalments, £3, 3s. 2d. When, however, the schedule was returned from the office of the Board of Inland Revenue in London, it was accompanied with a claim for duty in respect of the said dwelling-house, as having formed part of the heritable succession of Miss Williamina Rutherfurd Finlay.

"9. It is agreed that this case shall be decided on the assumption that the provisions of the Apportionment Act have no application to its circumstances.

"The questions upon which the opinion of the Court is desired are,—

"1. Whether the instalments of succession-duty, declared payable by the Act 16 and 17 Vict. cap. 51, sec. 21, are due to the Crown by the said Walter Stevenson, in respect of a succession to the said dwelling-house having, in the sense of the said Act, been conferred on Miss Williamina Rutherfurd Finlay upon the death of her sister, Miss Janet Rebecca Finlay?

"2. Whether, under the Act 16 and 17 Vict. c. 51, succession-duty is payable to the Crown by the said Walter Stevenson, in respect of a succession to the said dwelling-house having, in the sense of the said Act, been conferred upon him on the death of Miss Williamina Rutherfurd Finlay?

Or,

"1. Whether the interest of the said Walter Stevenson in the said dwelling-house is, in the sense of the Act 16 and 17 Vict. cap. 51, the interest of a succession to the late Miss Janet Rebecca Finlay?

"2. Whether, in the event of its being held that the late Williamina Rutherford Finlay had, in the sense of said Act, an interest in said dwelling-house, as successor to the late Janet Rebecca Finlay, the said Williamina Rutherfurd Finlay, was not, at or prior to her decease, in the sense of said Act, competent to dispone by will of a continuing interest in the said dwelling-house?

The Lord Ordinary (ORMIDALE) pronounced this interlocutor:—

"Finds, in answer to the first two questions in the special case, (1) that the instalments of succession-duty, declared payable by the Act 16 and 17 Vict. c. 51, sec. 21, are not due to the Crown by the defendant Walter Stevenson in respect of a succession to the dwelling-house, referred to in the information and special case, having, in the sense of the said Act, been conferred upon Miss Williamina Rutherfurd Finlay upon the death of her sister, Miss Janet Rebecca Finlay; and (2) that under said Act, succession-duty is not payable to the Crown by the defendant Walter Stevenson in respect of a succession to the said dwelling-house having, in the sense of said Act, been conferred upon him on the death of Miss Williamina Rutherfurd Finlay: Finds, in answer to the last two questions in the special case, (1) that the interest of the defendant Walter Stevenson in the said dwelling-house, is, in the sense of said Act, the interest of a succession to the late Miss Janet Rebecca Finlay; and (2) that, even supposing the said Miss Williamina Rutherfurd Finlay had, in the sense of said Act, an interest in the said dwelling-house, as successor to the said Janet Rebecca Finlay, the said Williamina Ruther-