

nesses, James Browning, joiner, Edmonston, and James Lockhart, gardener, Edmonston, while the said John Moir Macqueen well knew that the said Alexander Reid had not signed said bonds, or either of them, before the said witnesses, to the loss, injury, and damage of the said pursuers ?

- "4. Whether, on or about 9th May 1854, and at the delivery of the said bonds, the said John Moir Macqueen falsely and fraudulently represented to the said John French, as agent foresaid, for the purpose of enabling the said John French to complete the testing clauses of said bonds, that the said bonds were signed by James Kay, smith at Lauder, and William Glass, residenter there, as witnesses, while he well knew that the said James Kay and William Glass, who subscribed said bonds, did not reside at Lauder, but in Edinburgh, to the loss, injury, and damage of the said pursuers ?
- "5. Whether the defender, as agent foresaid, induced the pursuers respectively to advance the foresaid sums of £1200 and £300 on said bonds and dispositions in security over said subjects, by falsely and fraudulently overstating the rental of said subjects, to the loss, injury, and damage of the said pursuers ?
- "6. Whether the defender, as agent foresaid, undertook the duty of getting the said bonds duly executed by the obligants therein ; and whether he failed to perform said duty, to the loss, injury and damage of the pursuers ?
- "7. Whether, on or about 9th May 1854, and at the delivery of the said bonds, the said John Moir Macqueen fraudulently represented to the said John French, as agent foresaid, that the said bonds had been duly executed by the obligants therein, while the said bonds had not been duly executed by said obligants, to the loss, injury, and damage of the pursuers ?"

Damages laid at £840.

The parties, having failed to adjust issues before the Lord Ordinary (Barcaple) his Lordship reported the case.

FRASER and SCOTT, for the pursuers, argued—It is quite competent, in an action at the instance of two or more persons, even when they are unconnected, to conclude for a sum in name of damages to be paid to them all jointly. In the present case the several persons were not unconnected, as the two bonds on which they had advanced their money were secured *pari passu* over the same subjects. The two bonds were contemporaneous in date, and were carried through by the same agent. There was a general agreement to lend £1500, and it was for the mere matter of convenience that the securities were taken in the shape of the two bonds, one for £1200, and the other for £300, instead of one bond for £1500.

LORD ADVOCATE and W. N. MACLAREN, for the defender, answered—This action is at the instance of two different sets of pursuers. The first of these sets consists of the two parties first named in the summons, who aver that they lent £1200 to Scott on a bond and disposition in security. The other set consists of the two last-named pursuers, who aver that they advanced £300 to Scott on a separate bond and disposition in security. The two bonds were two totally separate and distinct transactions. The first two pursuers accordingly are averred to have suffered damage out of a transaction totally separate and distinct from that out of which the last two are averred to have suffered.

The summons, notwithstanding, concludes that the defender should be decreed to pay to the whole four pursuers jointly the sum of £840. It was quite incompetent for two or more sets of unconnected pursuers, suing together in one summons of damages, to conclude for one sum of damage to be paid to them all jointly. In order that the summons should be sustained at the instance of two or more sets of unconnected pursuers, it must conclude for a separate sum in name of damage to be paid to each set. *Harkes v. Mowat*, 4th March 1862, 24 D. 701 ; *Fleshers of Dumfries v. Rankine*, 10th December 1816, F.C.

The Court sustained the second plea in law for the defender, to the effect that the conclusions of the summons were not framed in such terms as to authorise the Court to pronounce decree for reparation and damages in the present action. There were here two sets of pursuers with no community of interest—nay, whose interest might at any time become adverse. Their respective claims might come to depend upon quite different grounds ; the one might succeed and the other fail, and yet they had no mode, nor any clue to a mode, of ascertaining what amount of interest each set of pursuers had in the sum of £840 concluded for.

Action dismissed with expenses.

Agents for Pursuers—Murray, Beith, & Murray, W.S.

Agent for Defender—John Moir Macqueen, S.S.C.

PETITION—MORRIS (*ante*, vol. ii., p. 222.)

Appeal to House of Lords—Interim Execution. A petition to apply a judgment of the House of Lords affirming one of this Court is incompetent ; and one for delivery of a bond of caution to repeat expenses, ordered to be paid under an application for interim execution, is unnecessary, where the judgment is affirmed, because the bond is conditional on reversal only.

In this case the Court of Session had decreed in the petitioner's favour, with expenses, and an appeal having been taken to the House of Lords, had granted *interim* execution for expenses on the usual bond of caution for repetition being lodged. The House of Lords having simply affirmed the judgment, the petitioner in this petition asked the Court to apply the judgment of the House of Lords, and to grant warrant to the clerk for delivery of the bond of caution.

ORR PATERSON appeared for the petitioner.

ALEX. BLAIR for the respondent.

The Court, *ex proprio motu*, dismissed the petition as unnecessary, holding that where the House of Lords' judgment was a simple affirmation, it was neither necessary nor competent to apply the judgment, and there was no occasion for delivery of the bond of caution, because its coming into operation was conditional on reversal only.

Agents for Petitioner—Duncan & Dewar, W.S.

Agents for Respondent—Hunter, Blair, & Cowan, W.S.

Wednesday, Dec. 5.

FIRST DIVISION.

CLEPHANE AND OTHERS *v.* MAGISTRATES OF EDINBURGH AND OTHERS

(*ante*, 22 D. 1222, and 2 Macp. H.L. 7).

Property—Mortification. Held that the University of Edinburgh had no right, under the

charters, to participate in the property or funds of Trinity Hospital.

This action was instituted by certain pensioners of the Mortification of Trinity Hospital of Edinburgh against the Lord Provost, Magistrates, and Town Council, both as representing the community of the city and as administrators and Governors of the Hospital, and the Presbytery of Edinburgh. The summons concludes for a decree of declarator that the Church called *Trinity College Church*, with the building known as *Trinity Hospital*, were vested in the pursuers "as trustees and administrators solely and exclusively for the ends, uses, and purposes mentioned and contained in a charter of King James VI., dated 12th Nov. 1567, and the defenders are not entitled to use and apply the property thereby conveyed, or the produce or prices thereof, in any other manner, or for any other uses and purposes than the uses and purposes prescribed and mentioned in the said charter;" and in particular, that they are bound to apply the sum of £17,671, 9s. 6d. received from the North British Railway Company, as therein mentioned, *exclusively* for behoof of the hospital in terms of that charter; and that they are not entitled to apply any part of that sum "in the purchase of ground, or site for, or in the erection of a church to be used as one of the city churches of Edinburgh, or for any other purpose not conducive to the use and benefit of the said Trinity Hospital."

The Court of Session, on 26th June 1860, found that the sum received from the Railway Company was applicable to the acquiring of a site and the erection of a church within the locality designated as the parish of Trinity College, or as near thereto as conveniently may be, with equal convenience of access and accommodation, and of the same style and model as the church formerly existing, and that the Magistrates were bound to apply the said money, or as much thereof as might be necessary, for the accomplishment of these purposes. The House of Lords on appeal reversed this finding on 15th February 1864, and the case then came back to the Court of Session in order that effect should be given to the judgment of the House of Lords, by which it was declared that after expending a sum not exceeding £7000 in purchasing a site and rebuilding the church, "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 by the charters dated respectively 12th November 1567 and 26th May 1587, in such proceedings mentioned according to a scheme to be settled for the purpose, including therein the rebuilding of the hospital, if the same shall be deemed necessary." A state and scheme having been ordered by the Court and lodged by the magistrates, the University of Edinburgh made appearance in the case, and asked leave to sist themselves as parties, in order that they might establish a claim which they made to be found entitled and preferred to the one-half of the revenues and property of the foundation, or to such portion thereof as shall be considered just. The Court, without formally sisting the University, allowed it to lodge a condescendence and claim, and a record was made up and closed as betwixt it and the magistrates. It is unnecessary to detail the grounds of the claim as these are fully stated in the judgment of the Court.

DEAN OF FACULTY, MONRO, and ROBERT BERRY for the University, pleaded:—

"1. In virtue of the charters and Acts of Parliament above referred to, and specially of the charter of the 26th day of May 1587, and of the said judgment of the House of Lords, the funds and property of the foundation of Trinity College and hospital, are applicable, *pro-parte*, to the purposes of the University of Edinburgh, and to the support of professors and students therein. 2. The Lord Provost, Magistrates, and Council of the city of Edinburgh are not entitled, as trustees of the said foundation, to devote the whole revenues thereof to the support or aid of persons unconnected with the university, or to purposes exclusive of the university. 3. The said Lord Provost, Magistrates, and Council, as trustees aforesaid, are not entitled to found upon any alleged long use, or prescription, or practice of payment, inconsistent with the charters regulating the foundation, or on any alleged *mora*, or non-assertion of the right of the university, as affording any answer to the claim of the university. 4. The said Lord Provost, Magistrates, and Council, having had the management and control of the affairs of the University down to the passing of the Act 21 and 22 Vict., cap. 83, cannot found on any alleged long use or prescription, or practice of payment inconsistent with the charters regulating the foundation, or on any alleged *mora* or non-assertion of the right of the university, as any answer to its claim to share in the funds of the foundation. 5. The *Senatus Academicus* of the University, subject to such control as is provided by the Act 21 and 22 Vict., cap. 83, is entitled to administer the revenue of the said foundation applicable to the University. 6. The state of the funds of the foundation lodged by the Lord Provost, Magistrates, and Council, as trustees foresaid, is incomplete and insufficient on the grounds above stated. 7. The scheme of application, lodged by the Lord Provost, Magistrates, and Council, is inconsistent with the charters regulating the foundation, and with the said judgment of the House of Lords, and is, in itself, otherwise objectionable on the grounds above stated. 8. The University of Edinburgh is entitled to be preferred to a share of the revenues and property of the foundation in terms of its claim."

YOUNG, CLARK, and SHAND, for the Magistrates, pleaded.

"1. The claimants' averments are not relevant, or sufficient in law to support the claim now maintained by them. 2. The claim cannot be successfully maintained, in respect the funds and property now belonging to the charity are held by the respondents under the conveyance contained in the said foundation-charter of 1567, and under mortifications by private individuals; that the maintenance or support of the University is no part of the purpose of that charter, or these mortifications; and that by none of the charters founded on by the claimants was any right or claim to the said funds or property, or any part thereof, conferred on the University. 3. The charter of 1587 founded on, being merely a charter of confirmation of prior rights and titles, under which the subjects had been long held and possessed by the respondents' predecessors was inoperative and ineffectual to confer on the University any rights of the nature claimed by them in any of the subjects therein mentioned. 4. In respect of the purposes of the charters founded on, as these have been explained by the actings and usage following thereon, and *separatim*, in respect

of the discretion vested in the Magistrates and Council by the charter of May 1587, and of their resolution in the exercise of their discretion, the claim ought to be repelled. 5. The claim is barred by prescription. 6. The claim is barred by *mora* and taciturnity. 7. The claim ought to be repelled, in respect the claimants averments are unfounded in fact. 8. In any view, the administration of the funds, including any part thereof to which the claimants may be able to instruct right, rests with the respondents, and to that extent the claim ought to be repelled."

GIFFORD was for the pursuers.

At advising,

Lord CURRIEHILL—The Lord Provost, Magistrates, and Town Council of Edinburgh were the only parties who originally appeared as defenders in the action. The only question which at first arose in it, was, whether or not all the sum of £17,671, 9s. 6d., which had been received by these defenders from the North British Railway Company for the original church of the Colledge, was to be expended in rebuilding another church of the same style and model as that of the original church. And the first thing which we have now to do is to determine how we are to dispose of the conclusions as to that matter. To a great extent we are now relieved from difficulty as to it by instructions we have received from the House of Lords. This Court having adjudged that the sum received from the Railway Company should be expended in rebuilding the church according to a style and model similar to the original, their Lordships, on an appeal from that judgment, reversed it, and declared that "it is fit and proper that so much of the money received by the defenders from the North British Railway Company as will be sufficient for the purpose, but not exceeding £7000, should be applied in the purchase of a site and in building a church, which, after reserving full accommodation for all the inmates of the hospital in the said proceedings mentioned, and persons connected therewith, will afford to the inhabitants of the district in the said proceedings mentioned, as much accommodation as was afforded by the collegiate church in the said proceedings mentioned, which has been removed: And it is further declared that such church ought to be built in connection with the hospital (if the same shall be rebuilt under the scheme herein-after directed), or on a site as near thereto as can be conveniently obtained: And it is further declared that the duty of building such church belongs to the defenders as trustees of the said charity, and that they will not be under any obligation to observe or follow the style or model of the old church in the said proceedings mentioned in such new building: And it is further declared that such new church will be the property of the said charity, subject to its being used, and, if so used, then to its being kept in repair and maintained, in like manner as the said old church was before its removal by the said Railway Company: And it is further ordered that the defenders do forthwith bring in and lodge with the Court of Session a minute showing the site and plan of building of such new church; and the building is not to proceed until such plan and site have been approved of by the said Court."

Our duty is now to carry that judgment into effect; and of course we shall find and declare in the terms therein set forth, and shall appoint the defenders to lodge a minute showing the site and plan of the new church. But in order that such appointment may be farther carried into effect,

there are two questions which require to be decided. One of these is, whether the *Hospital* which was upon the ground included in the charter of 12th Nov. 1567, and which also has been purchased and appropriated by the North British Railway Company, ought to be rebuilt? The House of Lords appears to have left this matter to the discretion of this Court. The trustees have stated their opinion that it would be for the interest of the charity that instead of expending the funds in building a new edifice the revenue of the funds of the institution should be employed in affording out-door relief to the beneficiaries, I think that that opinion is a sound one, more especially as a large proportion of the revenue of the institution is derived from other mortifications which from time to time have been made in its favour by other parties are applied in that way; and as, moreover, the trustees have ascertained from the experience of about sixteen years since the old hospital was sold to the Railway Company, that this is the most beneficial mode of administering the revenues. I therefore think that no new hospital should be built; and that the site of the new church may be fixed upon that footing.

The other question which requires now to be settled is, how the interest which has accrued upon the £7000 since payment thereof was received by the defenders is to be applied. According to the judgment of the House of Lords that part of the sum which was received by them from the Railway Company was appropriated (under reservation of full accommodation for all the inmates of the hospital and persons connected therewith) to the accommodation of the inhabitants of the district. I therefore think that these parties are to be held to have been the beneficiaries of that part of this fund; and that the revenue arising therefrom is held for them. That this is the true meaning of the judgment of the House of Lords is confirmed by the declaration it contains that what was to be applicable to the enlargement and maintenance of the hospital was to consist of "the residue of the money received from the Railway Company, and all interest thereon," with the hospital's other property. It was the interest of the residue only, after deducting the £7000, which was directed to be so applied. Hence I think that the interest which has accrued or may yet accrue on that £7000, under deduction of all sums expended or to be expended by the defenders in procuring temporary church accommodation for the congregation in the meantime, ought, along with the principal sum, to be applied in erecting the church; and that the plan to be lodged by the defenders ought to be framed upon that footing. But, on the same principle, I think that the interest for which the defenders are so accountable, is not legal interest on the £7000, but the sums actually received by the defenders periodically as interest and as accumulation thereof, subject to the deduction already mentioned.

The result, in my opinion, is, that in the question between the original parties to the action, we should pronounce findings in conformity with the judgment of the House of Lords, and to the farther effect I have now stated; and should accordingly appoint the defenders to lodge a state of the £7000 and interest which has accrued thereon, under deduction of the advances I have referred to; and also a minute stating a site and plan of the new church, in conformity with these findings. On such appointment being complied

with, and the fund being applied in building the church, the defenders will be entitled to be assoilzied to that extent and effect from the conclusions of the action; but *quoad ultra* decree ought to be pronounced against them as trustees of the hospital in terms of these conclusions.

Since the action has returned from the House of Lords, another party, namely, the University of Edinburgh, has appeared in it, stating that it is entitled to participate in the funds, and praying to be sisted as a party to the process to protect that claim. The Court, without formally sisting that body, allowed it to give in a condescence of their claim, and the condescence it lodged has been answered by the defenders. As it has not instituted any action at its own instance against the defenders, it could not competently obtain any decree against them in this action decerning any part of the funds to be paid or conveyed to it; and therefore their object in craving to be sisted and to state that claim appears to be to endeavour to prevent the pursuers from obtaining such a decree of declarator as is concluded for in their summons.

To enable us to dispose of this claim, we must first ascertain what the subjects were which were provided for Trinity College Hospital by the charter of 12th November 1567, and then inquire whether or not any part of, or interest in, these subjects has since been given to the University. This inquiry will be facilitated by premising a brief statement of the constitution of the original institution of Trinity College. It was founded by the widow of James II., by a charter dated 25th March 1462, a copy of which is in Maitland's History, and a notarial copy of which is understood to be in the repositories of the Town Clerk of Edinburgh. The subjects of that grant were a church and an hospital, and gardens and grounds attached thereto, consisting of a great part of the area lying between the south side of the Calton and the north back of the eastern part of Edinburgh. The establishment was to consist of a provost, eight prebendaries, two choristers, and thirteen paupers, called beidsmen, to be maintained in the hospital. A separate endowment was thereby made for the provost and for each of the eight prebends individually and their respective successors. Thus the provost was endowed with the church of Soutra, the lands of Barns of Soutra, and the church of Lempitlaw with its pertinents. The first prebendary (who was to be styled the Master of the Hospital of the Holy Trinity) was endowed with the fourth part of the fruits of the rectory of Strathmartin and lands of Falahill, and several rights of annual rent out of other lands. The second prebendary (who was to be styled Sacristan) was endowed with five merks of land in the town of Hill in the lordship of Balerno, five merks of land in Browdestanes, and a fourth part of the fruits of the rectory of Strathmartin. In like manner each of other six prebendaries was endowed with special subjects, which are specified in the charter. Besides these endowments to each of these functionaries, there were other three provisions made by that charter. One of them consisted of certain subjects, the revenues of which were appropriated for supporting the two choristers. The second consisted of various annual rents and lands, which were appropriated for supporting the thirteen beidsmen in the hospital. And the third, which consisted of the rest of the lands of Balerno (beyond the portion thereof appropriated specially to certain of the prebendaries) and an annual rent out of the lands of Kirkurd,

was appropriated for the reparation of the church of the college.

But neither the church itself, nor the hospital, nor the grounds within which they were to be erected, were included in the benefices which were so provided for these different functionaries and paupers.

When the Reformation took place about a century afterwards, these grounds and the edifices erected upon them, which were mortified to the religious establishment in its corporate capacity, and likewise the benefices which were so conferred upon the provost and the respective prebendaries and other functionaries individually, fell to the Crown. But the provost and the prebendaries, having embraced the reformed religion, appear to have been allowed to retain the enjoyment of their benefices during their lifetimes.

This was the state of matters when the charter by James VI. of 12th November 1567, upon which the summons in this action is founded, was granted. It proceeds upon a recital of the desire of his Majesty and the Regent to relieve the destitute poor, and to promote a design by Sir Simon Preston, who was then Lord Provost of Edinburgh, to build, found, and endow an hospital for supporting such destitute classes in the city of Edinburgh, by giving to him (I quote from the translation produced in process) "such *place* now vacant in our 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." The subjects of the grant, which was accordingly made by this charter to the Provost, Magistrates, and community, and the purpose for which the grant was made to them, are thus described:—"All and whole that *church*, called the Collegiate Church of the Trinity, with the kirkyard, *houses*, biggings, both ruined and built, orchards, gardens, dovecot, and pertinents thereof whatsoever, formerly occupied and inhabited by the Provost and Prebendaries of the said College Kirk, with the place and part biggings and yards of the hospital called Trinity Hospital, lying contiguous to the said College Kirk, with the garden on the west side thereof at the foot of our street or vennel called Leith Wynd, now in our hands and at our gift and disposal as undoubted patrons thereof, according to the tenor of the acts and statutes made since the time of the recent reformation of religion, 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."

Thus the subjects of this grant consisted only of the fabric of the church and the old hospital and of the grounds forming the area within which they were situated, and not of the entirely different subjects situated in various parts of Scotland which formed the subjects either of the benefices of the provost and the individual prebendaries, or of the separate provisions for the choristers and for supporting the thirteen beidsmen and the fabric of the church. As already stated, the provost and prebendaries had still been left in the enjoyment of their benefices; and this charter contained a clause providing also "That this gift and disposition shall not prejudice the right of *patronage* of the provost and prebendaries of the said College Kirk of the beidsmen now placed and endowed in the said hospital in terms of their *infestments*." The right of presenting the other inmates of the new hospital which was to be erected was conferred upon the grantees, the Lord Provost, Magis-

trates, and Council of the city. The grant confers upon them power to dispose of the subjects so conveyed to them "as to them shall seem (good), providing, however, that they shall be bound to apply the places and others foresaid to the foresaid use and no other."

The *tenendas* of that charter bears that the subjects were to be held by the disponees of the Crown "in free *bleuch* farm for ever, freely, quietly, and in peace, without any revocation or gainsaying whatsoever;" and the *reddendo* is the payment of a silver penny yearly on the ground of the subjects if asked only.

Thus then the *parties* for whose behoof, as the beneficiaries, this grant was made were the beneficiaries of the new hospital which was about to be erected upon the ground. And the subjects of that grant consisted of the church and the hospital, which had been erected under the Foundation Charter of 1462, and the grounds attached thereto. It did not include the quite different subjects with which, by that former charter, the provost of the original institution and each of the eight prebendaries thereof had been endowed. They, as already mentioned, were not then even dispossessed of the enjoyment of these benefices, and of the patronage of the thirteen beidsmen.

Although the subjects contained in the charter of 1567 were granted exclusively for behoof of the hospital, yet, soon afterwards, in consequence of some arrangements as to division of the general parish of Edinburgh, and the long usage which had followed thereon, the inhabitants of the adjacent district acquired a qualified right to accommodation in the church, as has been adjudged by the House of Lords, and they are now entitled to have such accommodation as I have already mentioned in the new church which is to be built.

But certain it is that under that grant the University of Edinburgh acquired no right to or interest in the subjects thereof. Not only is the University not mentioned in it, but it could not be so, because it had no existence then or for about seventeen years thereafter; and hence they can claim no right thereto without showing that subsequently the hospital was deprived of what was so granted exclusively for its behoof in 1567, and that something which was taken from it has subsequently been granted to the University. It is accordingly maintained by the University that the Crown did do this by three charters, one dated 23d June 1585, a second dated 26th May 1587, and the third dated 29th July 1587.

It appears to me that the grant which had thus been made by the Crown in 1567, to the Provost, Magistrates, and Council, for the purposes therein set forth, would not have been afterwards revocable by the Crown at its pleasure, even had it wished to do so. The Crown was divested of the subjects thereby conveyed for a purpose which was undoubtedly lawful, and it had not thereafter power to convey these subjects to or for behoof of other parties. But I do not see that the Crown ever has indicated any intention of doing any such thing, by either of the three charters upon which the University founds.

I. The charter of 23d June 1585 is merely a charter of resignation, proceeding upon a conveyance granted by Robert Pont, then the *Provost* of Trinity College Church, in favour of the Magistrates and Town Council. That conveyance was contained in a contract between Mr Pont and the magistrates, whereby he conveyed to them for an onerous consideration his benefice of the provostry.

The charter of resignation which was granted thereupon by the Crown, as the superior into whose hands the subjects were resigned by the disponent in favour of the disponees, is engrossed *ad longum* in the instrument of sasine which followed thereon. Before showing for whose behoof this charter was granted, let us see what the subject of that grant consisted of. These subjects are described as consisting of "totum et integrum beneficium prepositure ecclesie collegiate trinitatis prope Edinburgh," with all and sundry the churches, teinds, and other particulars therein generally enumerated, "dict prepositure spectan ubicunque infra regnum nostrum jacent," with the provost's right of patronage of the beidsmen. It therefore did not include the edifice of the church, or of the original hospital, or the sites thereof, or the adjacent grounds forming the gardens, orchards, and other appurtenances thereof, of all which the Crown had been denuded eighteen years before. Moreover, this charter of resignation did not include the *benefices* with which the eight *prebendaries* had been separately endowed as already mentioned. That this renewal of the investiture of the benefice of the provostry included nothing more than what had previously belonged to the provost individually appears farther from the clause of *quaequidem*, which sets forth that "quodquidem beneficium prepositure collegii trinitatis cum omnibus et singulis pertinentijs ejusdem superscriptis dilecto n'ro oratori Roberto Pont ultimo preposito et possessori ejusdem. per prius pertinuit, et per ipsum ejusque procuratores et patentes terras in manibus n'ris ad effectum prescriptum," were resigned, &c.

Thus, the subject of that grant did clearly not include all or any part of the subjects of the grant of 1567. It therefore matters not in the present inquiry what the purposes were of this separate grant of the benefice of the provostry. But its purpose is stated to have been "pro sustentatione seniorum, decrepitorum, orphanorum et pauperum infra dicta hospitalia ac pauperum scoleasticorum infra [dictum] collegium et scolas omni tempore futuro introritten colligen uten et dispenen." And whether or not the hospital which had been built on the ground which had been conveyed to the magistrates in 1567 might have been entitled to participate in the benefit of this grant also—this, at least, is certain, that there was nothing in this grant which gave to the University of Edinburgh or to any other party whatever any right to participate in the subjects which had been irrevocably provided eighteen years before for the benefices of Trinity Hospital exclusively.

II. The next inquiry is whether the charter of 26th May 1587 deprived the new hospital of right to any part of the edifices, lands, and others which had been feued to it in 1567, and transferred the same to the University. This charter of May 1587 consists of two parts, which must be distinguished. The first part consists merely of a confirmation of the prior charter of 1585. Such a confirmation was proper, because, as it was merely a charter of resignation, or in other words a more renewal of the investiture of the provost in his provostry; and as his right to the benefice was merely a *lifereit* one, and as the confirmation of it did not extend its operation to subjects which were not contained in it, nothing more requires to be said as to that part of this charter. The second part, besides containing a *novodamus* of that benefice of the provostry, contains also a grant of other subjects; and let us now see what these other sub-

jects consisted of, and for what purposes the grant of them was made. As I read that grant, its effect was only to transfer to the Lord Provost, Bailies, and Council of the City the different subjects which, as already stated, had constituted the benefices of the several prebendaries as well as of the provost of the old institution, and also the provisions for supporting the choristers and the beidmen, and for the reparation of the church. The subjects of that grant are described in its dispositive clause—"Totam et integram predictam preposituram Trinitatis Collegii, cum omnibus et singulis ecclesiis decimis garbalibus ac aliis decimis glebis mansis edificijs pomarijs hortis a'nuis redditibus advocacionibus donationibus ac jure patronatus prebendariorum et capellaniarum dicti collegij cum donatione oratorum pauperum vulgo beidmen et bedlyaris n'cupat aliorumq. officiorum dict. prepositure et hospitali dicti collegij prope eadem fundat spectan una cum ecclesijs parochialibus de Sowtraw et Lempitlaw alijsq. ecclesijs et decimis dict. prepositure a'nexatis cum loco pomario et horto vocat. Dingwall eisdem spectan omnibusq. alijs et singulis fructibus emolumentis juribus casualitatibus proficijs deurijs tenentibus tenandrijs et justis pertinent dict. prepositure spectan ubicumq. infra regnum n'rm ad burghum seu terras jacent. Ac cum omnibus et singulis ecclesijs decimis fructibus deurijs emolumentis an'is redditibus et proficijs quibuscunq. ad o'ia et singula prebendaria et capellania dicti collegij aut ad singulos predictos prebendarios in comitate seu alicui uni eorum in proprietate spectan aut per ipsos ipsorumve alicum possess. antea, cum omnibus redditibus proficijs emolumentis terris et tenementis ad prefatum collegium prepositum prebendarios et membra ejusdem vel ad sustentationem ecclesie domorum edificiorum dicti collegij fundat et mortificat."

These were the subjects of the grant of 1537. And the purpose for which that grant was made, as stated in the preamble, was that all the fruits, profits, and emoluments of Trinity College, pertaining "tam ad prepositum quam ad prebendarios Cappellanos et alia ejusdem membra," should be transferred to the use "ministorum professionum literarum et pauperum sustentationem." And the purpose of the grant is still more explicitly stated thus—"Omnes et singulos fructus proficiuos et ementa predict ac h'moi ad ministrorum sustentationem, collegij ludorum literarum, et pauperum secundum eorum bonam discretionem super quam eorum conscientiam, oneramus, applicam."

Now, whatever may have been the import of this grant in other respects, it certainly had not the effect of rescinding to any extent the grant which, twenty years before, had been made to the charitable institution of Trinity Hospital, or of transferring any part of the endowment of that institution to the University of Edinburgh. In the first place, as already stated, the Crown had in 1567 divested itself of those subjects with which it had then endowed that institution, without having reserved power to rescind the grant. Secondly, the subjects contained in the charters of 1585 and 1587 consisted only of those subjects belonging to the original collegiate establishment which had not been included in the grant of 1567—viz., the benefices of the provost and of each of the eight prebendaries, and of the endowments for the choristers, for the support of the beidmen, and for the reparation of the church. Thirdly, the distinction between the subjects of the grant of 1567 and those of the grants of 1585 and 1587 is made very clear by the difference of powers of the

Provost, Magistrates, and Council under these grants. By the charter 1537, they are expressly required to apply the subjects thereby conveyed to them for the benefit of the new hospital in all future time, and to no other purpose whatever; whereas they are expressly authorised and directed by the charter of 1587 to apply all and singular the subjects thereby granted for the benefit of the ministry for promoting literature in the College of Edinburgh (which had by that time been founded), according to their own good discretion. And, fourthly, the subjects contained in the grant of 1567 were to be held by the Magistrates of the Crown by blench tenure for payment of a penny yearly, whereas the subjects of the latter grants were to be held in "pura et perpetua elemosina in perpetuum." And the reddendo was to consist of devout and humble daily prayers to Almighty God for the preservation of his Majesty and his successors, and the sustentation of the ministers serving the cure of the churches belonging to the provostry, or in their option paying a third part of the fruits of the provostry for their sustentation.

This charter of 1587 concludes with a reservation to such of the prebendaries of the college as were still living of the annual duties which they had been receiving so long as they should survive.

III. The remaining charter upon which the University founds was granted on 29th July 1587, on the very day when the general Act of Annexation of Church Lands was passed by Parliament. Although that Act itself contains an exception which would have saved from its operation all the grants which the Magistrates of Edinburgh had received of such subjects, they appear to have been desirous *ob majorem cautelam* to have obtained an express confirmation of these grants. But it is unnecessary to quote the terms of that charter, because it, at all events, made no alteration upon the previous grants. It confirmed them *seriatim*—"Juxta formam et tenorem earundem." But it does serve the purpose of explaining distinctly what the subjects were of the preceding grants. In particular, it states that the subject of the grant of 12th November 1567 consisted of "ecclesia collegiata trinitatis, vulgo ye trinitie College nuncupat cum ejusdem misionibus mansionibus domibus et hortis cum hospitale hospitalis collegij trinitatis nuncupat et horto ejusdem"—that the subjects of the grant of 23d June 1585 consisted of "prepositure dicti collegij trinitatis cum advocacione et donatione oratorum pauperum vulgo lie biedmen et bedlaris"—and that the subjects of the grant of 26th May 1587 consisted of the provostry, prebendaries, and chaplainries of the college.

There is another consideration, which shows that the University acquired no right by the charters on which it founds to participate in the subjects of the grant of 1567—and that is, the usage which has followed upon these grants. The inveterate usage following upon ancient documents is always a satisfactory element in an inquiry as to their meaning, and the fact of a period of nearly three centuries having elapsed since these charters were granted, without the University having ever before, in virtue thereof, claimed a participation in the subject of the grant of 1567, indicates that they never acquired any right to such participation.

The University founds upon the declaration in the judgment of the House of Lords that all the property of the hospital beyond what is to be employed in building the church "is applicable to the enlargement and maintenance of the said

charity as declared and established by the charters dated respectively 12th November 1567, and 26th May 1587. The University maintains that that declaration imports a finding that the latter charter is one of the titles of the hospital to its property, and that it, the University, also has right by that charter to participate in that property. But whether or not the University has a legal right to either subjects of the grant of 1587 (a question to which I shall presently advert), that declaration of the House of Lords, whatever effect it might have in entitling the hospital to participate in the subjects of the grant of 1587 in addition to its exclusive right to the subjects of the grant of 1567, affords no indication of the hospital being intended to be deprived of any portion of that right. This would be the case even if we had no explanation of the meaning of the reference; but the Lord Chancellor tells us in his speech at delivering the judgment what is the meaning of that reference to the charter of 1587. He says—"My Lords, I may say in passing, that the reason, in my mind, for introducing both charters is this, that your Lordships will find in the charter of May 1587 a rather more full description of the objects of the charity than is contained in the charter of 1567." And such is truly the case; the latter charter containing a clause which sets forth that, as the old hospital had become ruinous, and the new one, which had been built by the magistrates and sufficiently furnished by them, was better adapted for the poor, it should be lawful for them to support in the new hospital, on the funds of the charity, as many paupers as the funds would sustain, and to apply the old edifice to any other useful purpose. This declaration, therefore, in the judgment of the House of Lords, affords no support of the claim of the University of Edinburgh to participate in the funds of that charity.

I am therefore of opinion that the University has entirely failed to establish in any way a right to participate in the property or funds held under the charter of 1567, to which alone the conclusions of the present action relate.

But the judgment of the House of Lords farther contains a remit to this Court—1st, To inquire and ascertain of what the property of the hospital consists, and in what manner the money received from the North British Railway Company, and the interest thereof, have been invested or applied. 2d, To settle and approve of a scheme for the enlargement and maintenance of the charity as declared by the charters of 12th Nov. 1567 and 26th May 1587.

To enable us to execute the first of these purposes, the defenders have produced states of the property of the charity, the value of which, apart from the price of the church received from the Railway Company, is estimated at £67,344 7 6. And the sum received from that company for the church, with interest to 14th September 1863, but deducting outlays, . . .

18,420 12 11
 £85,765 0 5

The pursuers, on 14th Dec. 1864, lodged objections to these states. But all these objections appear to have now been either abandoned or obviated, excepting those made under head XII., to certain payments amounting in all to £7320, 14s. 6d., which were made relative to proposals which became abortive for rebuilding the church. One of these items consists of £1646 paid as rent of temporary places of worship for College Church con-

gregation. As already stated, credit will be given for that sum out of the interest of the £7000. As to all the other items under that head, I think that we cannot satisfactorily dispose of them at present, because they relate to arrangements for rebuilding the church, and it is possible that some of the things for which those charges are made may still be available in preparing a plan of the new church or in selecting a site for it. I therefore think it would be advisable to supersede disposing of the objection under this head until the minute and plan I formerly suggested shall be lodged.

But here the claim of the University comes up again. I have already stated that, in my opinion, it has no claim to participate in the subjects of the grant of 1567. But they maintain that they have right to participate in the subjects of the grants of 1585 and 1587, as the promotion of learning in that institution was one of the purposes for which these grants were made of the subjects of the provisions for the provost, prebendaries, and other members of the suppressed institution. But, in the first place, it was left entirely to the discretion of the Lord Provost, Magistrates, and Council of the city to dispose of these funds for the support of the poor and of the clergy, as well as for the promotion of education, as they might think proper; and although the terms of these grants might confer upon the University a title to inquire how the subjects of these grants have been disposed of, no legal right appears to have been thereby conferred upon them. Secondly, the defenders deny that the funds which they now hold for behoof of Trinity Hospital are included in the states now under consideration, and the University has not offered any evidence that such is the case. Thirdly, the defenders allege that the subjects which were contained in the grants in question were long ago appropriated to their destined purposes; and that the University got an ample share thereof, and have long been enjoying the benefit thereof. And, in my opinion, the fact of the University not having made the claim against the defenders until after the lapse of centuries, precludes them from now raising it. I therefore do not think that their claim in this aspect of it either can be sustained.

In conclusion, as to the scheme appointed by the judgment of the House of Lords, the defenders lodged a proposed scheme along with these states. But it will now require to be modified so as to give effect to the findings which are now to be pronounced, and which may hereafter be pronounced, as to the reserved objection. It may still be premature to lodge the amended scheme.

The other Judges concurred; and the Court pronounced the following interlocutor:—

"Edinburgh, 8th December 1866.—The Lords have resumed consideration of the record in the present action, with the judgment of the House of Lords, dated 15th February 1864, and the states of the funds and properties of Trinity College and Hospital, and scheme of proposed application thereof, and relative minute lodged by the defenders, the Lord Provost, Magistrates, and Town Council of the city of Edinburgh, as trustees and governors of Trinity Hospital, and objections thereto by the pursuers; and also the claim by the University of Edinburgh to participate in the fund in question, and answers thereto, and closed record thereon; and having heard the counsel for the parties on these proceedings, and on the whole cause: *Primo*—With reference to the questions between the pursuers and defenders under the con-

clusions of the summons and defences thereto : Find that the sum aftermentioned should be applied by the defenders, the Lord Provost, Magistrates, and Council of the city of Edinburgh, as trustees, governors, and administrators of Trinity Hospital in the purchase of a site for, and in building, a church which, after reserving full accommodation for all the beneficiaries of the hospital and persons connected therewith, will afford to the inhabitants of the district within which the hospital was situated as much accommodation as was afforded by the collegiate church which has been removed ; that the duty of building such church belongs to the said defenders as trustees of such charity ; that they are not under any obligation to observe or follow the style or model of the old church in such new building ; that such new church will be the property of the said charity, subject to its being used, and, if so used, then to its being kept in repair and maintained in like manner as the said old church was before its removal by the railway company ; further, find that the funds so to be employed by the said defenders shall consist of £7000 of the sum of £17,671, 9s. 6d., which they received from the said railway company as the price of the said former church, with the interest and accumulation thereof, which have accrued, or shall hereafter accrue, to the said 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 : Further, find 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 appoint the said defenders, within ten days from this date, to lodge in process a state of the foresaid fund as it is at this date, and also within six weeks from this date to lodge a minute, with a plan setting forth a site for and a plan of the church to be built as aforesaid. *Secundo*, With reference to the foresaid claim made by the University of Edinburgh : Find that the said University has not established any right to participate in the funds which belong to the said charity, in virtue either of the charter of 12th November 1567 or in any other way, and dismiss the said claim ; and find no expenses due to either the university or the said defenders in reference to the said claim. *Tertio*, With reference to the states of the funds of the charity lodged by the defenders : Find that all the objections stated against the same by the pursuers, excepting the items set forth under the twelfth head thereof, have been passed from or obviated, and repel the same ; and supersede *in hoc statu* the consideration of the said items in the 12th article. And *Quarto*, As to the scheme which has been lodged by the said defenders, supersede the consideration thereof until a future stage of the cause.

Agents for Pursuers—Wotherspoon & Mack, S.S.C.

Agents for Defenders—Graham & Johnston, W.S.

Agents for University—W. & J. Cook, W.S.

SECOND DIVISION.

RHIND'S TRUSTEES v. FLETCHER AND OTHERS.

Legacy—Construction—Conditio si sine liberis decesserit. A person left a legacy to his aunt, and directed his trustees, in the event of her

predeceasing him, to convey it to her children, and the survivors or survivor of them equally. The aunt predeceased the testator, leaving several children, and also grandchildren by a daughter who had died before the date of the settlement. Held that these grandchildren were not entitled to participate in the legacy, either under the words of the destination or on the principle of the *conditio si sine liberis decesserit*.

The competition in this case relates to the fourth part of a legacy of £2000 left by the deceased Alexander Henry Rhind, who died on 3d July 1863, under his trust-disposition and settlement, dated 1st January 1861, to his aunt, Mrs Anne Rhind or Gunn ; and “failing her by death before the term of payment of said legacy, and leaving lawful children,” he directed his trustees to “convey and dispose to such children and survivors or survivor of them equally among them, the share which their deceased parent would have received if alive.” The said Mrs Anne Rhind or Gunn predeceased the trustor, she having died on 26th February 1862. Mrs Gunn had several children by her marriage with her husband, George Gunn, and among them a daughter, who was married to John Leith, but who died before her mother, and before the foresaid trust-disposition and settlement was executed, leaving children.

The competing claimants are the children of Mrs Anne Rhind or Gunn who survived her, and the children of Anne Gunn or Leith, who died in the circumstances above stated.

The Lord Ordinary (Ormidale) held that no part of the legacy of £2000 in question ever vested in Anne Gunn or Leith, the mother of the claimants, the Leiths ; and that the maxim *si institutus sine liberis decesserit* was inapplicable to their position, and was not available to them. He accordingly preferred the other claimants.

The Leiths reclaimed.

SOLICITOR-GENERAL and JOHN HUNTER, for them, argued—The testator did not care for particular relations or degrees of relations. He liked them and their families all equally well. He speaks promiscuously of children, family, issue. The expression children includes grandchildren, unless there is a limitation in the context. If not, the Court will favour the extension of the meaning to grandchildren, if they are otherwise cut out. And a testament expresses intention as at the date of death. *Holt v. Mackenzie*, 2d Feb. 1701, M. 6602 ; *Roughhead v. Rennie*, M. 6403 ; *Christie v. Patersons*, Fac. Col., 5th July 1822 ; *Wishart v. 2310* ; *Sturrock v. Dunlop*, 6 D. 117 ; *Williams' Execut.* vol. ii. p. 983 ; *Roper*, i. p. 68 ; *Jarman on Wills*, ii. p. 135 ; *Magistrates of Montrose*, 1738, M. 6398 ; *Black v. Valentine*, 6 D. 689 ; *Smollet*, 23d Nov. 1810, F. C.

YOUNG and LEE, for the other claimants, answered—The authorities are clear that the word children does not include grandchildren. The testator did not intend to include grandchildren here ; he says “leaving lawful children.” Mrs Leith was not left ; she predeceased her mother. The condition *si sine liberis decesserit* can never receive effect in favour of children, unless it shall appear that the testator contemplated the institution of the parent. There must be an institute to allow the maxim to apply, but here the pretended institute was dead. *Sturrock*, 6 D. 117 ; *Black v. Valentine*, 6 D. 689 ; *Aitchison*, M. 1333 ; *Sandford on Entails*, p. 376.

At advising,

Lord COWAN—The trust-disposition and settle-