

the purpose of reducing her husband's will, so far as it interfered with her legal rights as his widow. The pursuer averred that the provision to her in her husband's will was grossly inadequate and unjust, and she elected to take what she was entitled to *jure relictae*. The defence was that the pursuer had homologated the will in question by various acts, and particularly by expressing herself satisfied with the provisions made in her favour.

The following were the statements made by the defenders in support of the plea of homologation:—“(2) After the funeral, the will was read by the executor, in presence of the pursuer Mrs Logan, two of the sisters of the deceased, viz., Mrs Renton and Mrs Bonthron, Robert Renton, Mrs Renton's son, and the defender George Logan; and on said occasion, after being read, the said pursuer expressed her entire satisfaction with its terms, saying that nothing could be fairer, and she then and there acquiesced in and homologated the same. She at the same time stated that the payment of the interest oftener than once a year would suit her best, and hoped there would be no disagreement about it. The said pursuer repeatedly, on subsequent occasions, expressed her approval of and acquiescence in said will. (3) The executor remained in the deceased's house with the said pursuer for about a fortnight after the funeral, and, with her approval, discharged his duties as executor by looking over and balancing the deceased's books, and making out the accounts. During all that time the said pursuer stated no objections whatever to the will, but uniformly declared her satisfaction therewith and approval thereof. (4) On 1st November 1867 the executor, on the footing and in the belief that the said pursuer had acquiesced in and homologated the said will, obtained himself duly confirmed by the Commissary of Berwick. Before and after that date the said pursuer and the executor had considerable correspondence on the subject. In said correspondence the pursuer continued to express her acquiescence in the will, and her approval thereof; and, at her request, the executor paid her, in February and April 1868, two sums of £5 each, to account of the interest payable to her under the will, and for which she granted receipts as to account of said interest. On the night of the funeral, as well as subsequently, the pursuer was made acquainted with the amount of her husband's estate, as nearly as could be. (5) Prior to 16th November 1867, the said pursuer took certain articles of the deceased's furniture, and agreed to pay their value, by a writing which she granted of her own free will, and of which the following is a copy, viz.:—*Mordington, 16th No. 1867.*—I, Cecilia Logan, hereby agree to take one eight-day clock and one bed with curtains, being part of the furniture of the late John Logan, my husband.

Value of clock,	. . . . .	£1 0 0
Bed and curtains,	. . . . .	1 10 0
		£2 10 0

which I promise to pay to Mr George Logan, executor of the said John Logan.” (Signed) ‘CECILIA LOGAN.’ (6) On 28th November 1867, on the footing and in the belief that the said pursuer had acquiesced in the will, the executor proceeded to administer and distribute the estate. *Inter alia*, he paid to the defender James Logan a sum of £100, in terms of the will; and he made up and carried through the residue-accounts of the estate with the Inland Revenue. (7) Notwith-

standing that the said pursuer had all along approved of, acquiesced in, and homologated said will, and allowed the executor to act on that footing and understanding, she, about the beginning of May 1868, employed Mr Bowhill, solicitor, Ayton, who on her behalf wrote to Mr Watson, solicitor, Coupar-Angus, the executor's agent, on 6th May 1868, that she was ‘clearly entitled to claim her *jus relictae*, and that she is further entitled to claim the liferent of the remaining half of the deceased's moveable estate, excepting the bequest of £100 to James, under the second purpose of the will.’ The said pursuer was not then entitled to repudiate the said will.”

The defender maintained the following preliminary pleas against satisfying the production:—“(1) The pursuer is barred from now questioning or repudiating her husband's will, by *mora*, acquiescence, and homologation. (2) The pursuer Mrs Logan having approved of, acquiesced in, and homologated her husband's will, and the executor having acted on that footing, she is not now entitled to have the production satisfied; and the action should be dismissed, or the defenders assoilzied from the same, with expenses.”

After proof, the Lord Ordinary (JERVISWOODE) found that the alleged homologation had not been proved.

The defenders reclaimed.

SCOTT for them.

J. MARSHALL in answer.

The Court adhered; holding that there was no evidence to show that the pursuer either knew what were her rights under the will, or what her legal rights were apart from the will. Without such knowledge there could be no homologation, even if the acts and expressions founded on by the defenders could in any case amount to that. It was observed by the Bench that in a case of this sort a reduction was unnecessary, as no will could be regarded as disposing of more than the *dead's* part of the executory.

Agents for Pursuer—Adam & Sang, S.S.C.

Agents for Defender—Lindsay & Paterson, W.S.

Saturday, Oct. 30.

### FIRST DIVISION.

CLEPHANE AND OTHERS *v.* MAGISTRATES OF EDINBURGH.

(See *ante*, vol. vi, p. 471.)

*Procedure—Kirk-Session—Sist—Site.* A kirk-session, who were not parties to an action involving the money out of which their church was to be built, *allowed* to sist themselves in a discussion as to the locality of the church's site. Procedure in selecting the site.

This case came before the Court on a petition by the defenders, dated 21st May 1869, to apply the judgment of the House of Lords. The Kirk-session lodged a minute, asserting their interest in the matter, and craving to be sisted as parties to the discussion. This the defenders opposed, on the ground that the ministers had not been parties to the action and the remit of the House of Lords. But the Court held they ought to be sisted.

A scheme of division of the surplus revenue of the Hospital, prepared by the City Accountant as accountant to the Hospital, was lodged in consequence of the decision of the House of Lords,

affirming the judgment of the Court of Session, not to build a Hospital, but to expend the surplus revenue in pensions.

There being a difference of opinion as which of various proposed sites was preferable, the Court remitted to Mr Lessels, architect, to examine and report upon the sites. He reported that, if the improvements at Chalmers' Close were carried out, that site would be the most eligible, but if not, then the Market Street site was next in point of eligibility. To make the Market Street site equally available with the Chalmers' Close site an extra cost of at least £400 would be required, in consequence of excavations and underbuilding necessitated by the irregularity of the ground, while another sum of £450 would be required for architectural treatment, as the church at Market Street would have three exposed fronts, while that at Chalmers' Close would have only one. Ireland's Woodyard would be the worst site. Various objections were urged against the sites by the respective parties; doubt being cast on the sufficiency of the funds, on the one side, and the probability of obtaining the desired site, on the other. After some discussion,

LORD PRESIDENT—The Court have had before them two proposals—one that the Church shall be built on a site in Chalmers' Close, but which, however, is dependent on certain improvements being carried out by the City Improvement Trustees, and the other, that it shall be built on a site in Market Street. It is needless to say any more about the site in Ireland's Woodyard, for that is conclusively condemned. The parties have agreed to a postponement of the case until after a meeting of the Improvement Trustees, to be held on Friday, and that is quite right; but we think it necessary meantime to appoint the Lord Provost and Magistrates to state by Saturday whether they have got the consent of the trustees under the Improvement Act to build their church on the site in Chalmers' Close, in the event of those contemplated improvements proceeding. On the other hand, we shall appoint the kirk-session to state by Saturday what they are prepared to undertake with the view of the adoption of the Market Street site. With these materials before us on Saturday, we shall probably be in a position to determine between the sites. It is not merely a question of the comparative eligibility of sites. The question of time, also, enters materially into the case; and there is one other matter which I think it right to state, and that is, that henceforth we shall be inclined, whenever this case is on the roll, to consider the expenses of the particular discussion, with the view of visiting on those parties who cause unnecessary delay and trouble the cost thereby created.

The other Judges concurred.

Minutes were lodged by both sides, and on 17th July the parties were heard on the question of the site. It was stated for the Magistrates that while they were willing to negotiate with the Improvement Trustees for the purchase of a site in Chalmers' Close for the church, the trustees had not yet come to any resolution as to the church. It was contended, however, that that site ought to be approved of, as being most suitable, when obtained, for the spiritual superintendence of the parish.

For the Kirk-Session it was argued—That the uncertainty of that site made it not so eligible as the site in Market Street, which was certainly procurable, and as to which the session undertook to raise an additional sum of £400 if necessary, although it was Mr Lessels' opinion that £7000 was

sufficient for the purpose of the church by an alteration of the plan.

Mr LAREN, for the Magistrates, argued—There is no statement as to the security that is to be offered for the additional £400 required for the site at Market Street. If the Court resolve that the church should be erected there, it will be necessary to see that the proper security is forthcoming. The site in Chalmers' Close is a more suitable one, having regard to the purposes of the foundation.

LORD KINLOCH asked what security there was that the site in Chalmers' Close would be acquired?

Mr M'LAREN presumed that it would be acquired in the same way as the Council had acquired their other property.

LORD KINLOCH—Somebody may be disposed to give more than the Town Council for the site.

Mr M'LAREN—That is quite possible.

LORD KINLOCH—Somebody might wish to build a theatre, and give double the sum which the Council would give.

Mr M'LAREN said that in the event of the Court approving of the site—although they could not give any guarantee on the subject—they had no doubt there would be no difficulty in the way of acquiring it. It had been found by experience that the best way to communicate instruction to the class of people who lived in Trinity College Church parish was to bring it to their doors. It was not likely that they would go to a church which would be erected at a distance from the district. The present congregation did not in reality consist of the parishioners, at least to any material extent; but it was an extraneous congregation, attracted by the talents, eloquence, and originality of the ministers who had been placed over that congregation for some years past. He did not, however, in the least blame the course these gentlemen were taking in promoting the site of Market Street. But he, for his part, maintained that the church should be in the centre of the district.

LORD DEAS said he had great doubt whether the Edinburgh congregations ever thought of the parish when they took their seats in the church. They went to the one which was most convenient, whether it was in the parish or not.

Mr M'LAREN said that Lord Deas' observations were well-founded as far as the church-going part of the population was concerned, but he looked on this as more of a missionary church.

Mr LEE said it was not an unknown thing in Edinburgh that churches should be out of the parishes with which they were connected. For example, the Old Church was a quarter of a mile from the nearest part of the parish. In regard to the site in Chalmers' Close, it would not be in the least degree objectionable to the Kirk-session if the street proposed to be made were completed, or if there was any prospect of its being completed and opened up within a reasonable time; but, in point of fact, the circumstances were such as to show their Lordships this, on the face of the proceedings, that the site which was suggested in Chalmers' Close was not and could not be available, although it was purchased to-morrow, for at least two or three years to come. The resolution which was on Friday come to by the Improvement Trustees was, that the new street, from Market Street to the head of Leith Wynd, should be proceeded with after the improvements at North College Street were effected. Now, he was informed that these improvements were of a very expensive character; that they were not begun; and that they would

not be completed, he was told by Mr Lessls, for two or three years at least. Now, in addition to that, the resolution was coupled with a limitation of a kind which really showed that it could not be relied upon. The resolution was, that in the meantime these proceedings were only to be to the amount of £7000; and what their Lordships had to contemplate was, that after two or three years—that was, after the College Street improvements were effected—there might be proceedings to the extent of £7000 carried on in the way of pulling down the buildings in this proposed new street. Anything they had had as to the action of the Improvement Trustees was most uncertain, and at the best very remote. He had no doubt the Magistrates, if their Lordships did not think the Chalmers' Close site suitable, would be disposed to do anything that was reasonable for getting the site which the Kirk-session proposed, before the Court; and he concluded by asking the Court to approve of the site which the Kirk-session had suggested.

Mr M'LAREN, in replying, said that the Magistrates would be prepared to build the church now, before the new street was opened, and he understood that the existing accesses to the site were sufficient.

Mr LEE said he did not think that the resolution of the Improvement Trustees authorised any proceedings until after the completion of the improvements at College Street. He wished to state that the old Trinity College Church was not in the parish of Trinity College. The church was on the north side of the Nor' Loch, whereas the parish was on the south side.

The Court then called upon Mr Lessels, who was present, to make a statement as to the comparative expense of erecting the church on the sites at Chalmers' Close and at Market Street. He stated that if the church were erected at Market Street the architecture would require to be of a plainer description than if it were built in Chalmers' Close, so as not to exceed the estimated cost.

The case was adjourned till the following Tuesday, in order that the minutes given in by the parties might be printed.

On Tuesday the Court, without hearing further argument, pronounced an interlocutor, in which they superseded consideration of the questions raised by the Magistrates and Kirk-Session till the third sederunt day in October, in order that the Lord Provost and Magistrates might communicate with the Improvement Trustees, and ascertain on what terms and conditions they could obtain the site at Chalmers' Close. The Court also directed the Lord Provost and Magistrates to report, on or before the first sederunt day in October—" (1) Upon what terms and conditions they can acquire the proposed site; (2) within what period they will undertake that the church shall be built and completed there; (3) what modes of access shall be allowed to the parishioners and congregation if the proposed alterations in Chalmers' Close are not carried out; and (4) what objection the Council have to the Market Street site." The question of expenses was for the meantime reserved.

The Court remitted to Professor Macpherson to report on the following points:—" (1) What are the sources of the various funds forming the capital of the Trinity Church, and how much are they? (2) In what modes are these funds invested? (3) What are the terms of mortification by private individuals in favour of the charity? (4) How and by whom the beneficiaries to these funds have been selected;

and, in particular, what rights of presentation other patrons besides the Town Council have had? (5) What is the number of outdoor pensioners? (6) What is the amount of allowances? (7) What is the gross annual income of the charity? (8) Any other matter the reporter thinks it proper to report on; and (9) What scheme the reporter would recommend?" The Court authorised Mr Macpherson to employ any accountant or other skilled person to assist him, and to hear parties, and to take evidence.

The following minute was accordingly lodged for the Lord Provost and Magistrates:—

"M'Laren, for the Governors and Administrators of Trinity Hospital, the Lord Provost, Magistrates and Council of Edinburgh, stated that they had communicated with the Trustees under the "Edinburgh City Improvement Act 1867," in order to ascertain on what terms and conditions they could effect a purchase of the site for Trinity College Church, suggested in Chalmers' Close; and had to state as follows:—(1) They can acquire the site referred to for £1760, with possession at Whitsunday 1870; (2) They will undertake that the proposed church shall be built and completed on the said site within a period of two years or thereby; (3) The present accesses to the area on which the church is proposed to be built are Chalmers' Close and Monteath's Close from the High Street, and Chalmers' Close from Old Physic Gardens. There can be no doubt that the street in continuation of Market Street will be formed without delay, as the resolution of the Improvement Trustees to form this street and to acquire the necessary property, is final. Their architect reports that the upper part of the street, viz., that portion between the church and the High Street, will be ready by Whitsunday 1871, and that the street may be expected to be open in its whole length by Martinmas 1871; (4) The Minuters object to the site suggested by the Kirk-Session of Trinity College Church, 1st, Because it is outwith the parish, and not convenient for the inhabitants thereof. 2d, Because a church is required in the parish, and is not required on the site suggested. 3d, Because the fund available, according to the judgment of the House of Lords, is insufficient to provide a church on the site suggested, and the minuters think that it would be contrary to their duty and to the judgment of the House of Lords to receive contributions or subscriptions to induce and enable them to provide a church on that site."

On the case being called to-day,

DEAN OF FACULTY and LEE, for the Kirk-Session, stated that they would not continue their opposition to the proposed site in Chalmers' Close.

LORD ADVOCATE and M'LAREN, for the defenders, acquiesced.

The Court accordingly, in respect of there being no opposition, approved of the site proposed by the defenders.

Agent for Kirk-Session—James Macknight, W.S.

Agents for Defenders—Whyte-Millar, Allardice & Robson, S.S.C.

Saturday, October 30.

## SECOND DIVISION.

WOTHERSPOON *v.* WOTHERSPOON.

*Husband and Wife—Separation—Aliment.* Circumstances in which the Court fixed the amount