

[HEARD 7th May—JUDGMENT 28th August, 1846.]

THE VERY REVEREND DR. WILLIAM JACK, Principal, and the
PROFESSORS of the University and King's College, Aberdeen,
Appellants.

SIR THOMAS BURNETT, of Leys, BART., *Respondent.*

Mortification.—Trust.—Charity.—Absolute or Conditional.—A gift, by a deed, in the form of a contract between the donor and a college, whereby the donor granted to the college for the maintenance of bursars in a specified manner, lands, the rents of which at the time were inadequate for the purpose intended, under a condition for re-entry in case of non-performance, and whereby the college as superior of the lands released the donor from past and future feu duties, is a gift of the lands to the college for its own use absolutely, subject to the maintenance of the bursars in the condition, and in no better condition, than that specified, although the lands may have so improved in value as that the rents have become more than adequate for that purpose.

BY the charter of erection of King's College, Aberdeen, among other persons to form the members of the college, it is declared that there shall be thirteen scholars unable to provide for themselves, who are to be supported in the college for three years, and for that purpose the following provision is made for them: “Tredecim insuper in artibus studentibus, cuilibet de
“ duodecim eorundem, duodecim marcas solven per procuratorem
“ communem dicti collegii, pro eorundem sustentatione in escu-
“ lentis et poculentis una cum cameris et aliis asiamentis infra
“ idem collegium gratis, et pro deo cum omni charitate et man-
“ suetudine ministretur. Tertio decimo studenti quinque tan-
“ tum libras, de annuis redditibus per præfatum quondam
“ magistrum Duncanum Scherer fundat. Inter quos, quilibet

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“ per vices deputetur pro custodia portarum loci mandato prin-
 “ cipalis sub-principalis et actu regentium pro tempore prout
 “ eis videbitur expedire, assignetur et deputetur qui custodiæ
 “ ejusdem exactam habeat diligentiam ita quod quilibet in turno
 “ suo per se et non per alium hebdomadim hujusmodi officium
 “ exercebit.”

On the 6th and 12th of October, 1648, a deed was executed whereby it was “ contractit endit and finallie aggreit betwix the
 “ pairties following to witt the Richt Worschipfull Sir Thomas
 “ Burnett of Leyis Knicht Barronett heritabill proprietar of the
 “ croftis landis and otheris underwritten on the ane pairt and
 “ the Richt Reverend Dr. William Guild, principall of the said
 “ colledge Mr James Sandilandis civilist and commoun pro-
 “ curatour of the samen and remanent professouris masteris and
 “ memberis thereof under-subscryveris on the oyr pairt in maner
 “ forme and effect efter following That is to say forsameikill as
 “ the said Sir Thomas Burnett of Leyis taking to his serious
 “ consideratioun the great utilitie and proffeit quhilk may
 “ redound to the kirk and commounwelth be the floorischning
 “ of schoolis colledges and seminaries of learning quherein the
 “ zouth may be so educat and trained that thereafter be Godis
 “ guid providence they may becum guid instrumentis in kirk
 “ and commounwelth and considdering that it fallis out oftymes
 “ that many guid spiritis for laik of meanis to maintene thame-
 “ selffis at schooles and colledges are forcit to leive off the cours
 “ of thair studies and to tak thameselffis to servile traidis and
 “ oyr baser imploymentis and the said Sir Thomas carieing ane
 “ great deale of respect and affectioun to the said Kingis Col-
 “ ledge of Auld Abdn. as to the place quher he had his educatioun
 “ thairfore the said Sir Thomas for the glorie of God the weil
 “ and utilitie of the churche and commounwelth the advancement
 “ of learning in the northerne pairtis of this kingdome the sup-
 “ plie and help of some poore ones that cannot be abill to main-
 “ tene thameselves at colledges and out of the speciall love favor

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“ and respect that he carries to the said Kingis Colledge of Auld
“ Abdn. hes mortefeit foundit and in maner underwritten and
“ upone the conditiones efter-specifeit provydit thrie burseris
“ of philosophie to be educat brocht up and maintenit everie ane
“ of thame for the space of four zeiris at the said Kingis Col-
“ ledge of Auld Abdn. according to the maner measour and
“ qualitie and as the rest of the burseries of philosophie pre-
“ sentlie in the said colledge alreddie foundit are educat and
“ enteritenit Upone the speciall provisioun and condition quhere-
“ upone this present mortificatioun dispositioun and resignatioun
“ efter-specifeit is grantit expresslie That the nominatioun and
“ presentatioun of the saidis thrie burseris sall appertene and
“ belong to the said Sir Thomas Burnett all the dayis of his
“ lyfytyme and efter his deceise to his airis-maill and successouris
“ lairdies of Leyis with power onlie to the said Sir Thomas and
“ his forsaidis to nominat and present to the principall masteris
“ and memberis of the said colledge of quhat sort and qualitie
“ it sall please thame now and in all tyme cumming and how
“ oft any of the saidis places sall be vacant efter the ending and
“ expyring of any of the saidis thrie burseris thair quadrienniall
“ course or deceise of any of thame or be the leiving and desert-
“ ing of the said colledge befor the ending of the four zeiris or
“ any uther maner of way they sall happen to vaik That the
“ onlie presentatioun as said is sall appertein to the said Sir
“ Thomas and his foirsaidis and the said mastēris and memberis
“ of the said colledge sall not refuse any quhom the said Sir
“ Thomas and his foirsaidis sall present to thame to any of the
“ saidis thrie places they being lauchtfullie vacant ay as said is
“ and gif it sall fall out that in any tyme cumming the masteris
“ and memberis of the said colledge sall prejudge and wrong
“ the said Sir Thomas of his presentatioun and sall refuse and
“ not accept quhom they sall present to thame to any of the
“ saidis thrie benefeices than and in that caice it is speciallie
“ aggreit and provydit be the tenor of thir presentis that this

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“ present mortificatioun with the dispositioun and resignatioun
 “ efter-specifeit sall be null of itself and have no strength force
 “ nor effect as gif the samen had never been maid and the said
 “ Sir Thomas and his foresaids sall have regress to the landis
 “ and otheris efter-specifeit notwithstanding of thir presentis
 “ It is alwyse declarit and aggreit upone betwix the saidis pairties
 “ that the said Sir Thomas and his foresaids sall be holden to
 “ observe the ordinary tyme about Michelmes quhen the rest
 “ of the burseris are presentit and do enter to the colledge
 “ querin gif he or his foresaids sall fallie in not observing the
 “ deu tyme in presenting to any of the saidis places that sall
 “ happen to be vacant at leist befor Hallomass in the samen
 “ zeir than and in that cais it sall be lawful to the saidis mas-
 “ teris and memberis of the said colledge to receive any poore
 “ scoller according to the qualitie requyrit in the rest of the
 “ burseris of old foundit in the said colledge to any of the said
 “ vacant places of the said thrie burses now fundit be the said
 “ Sir Thomas that sall happin to be vacant for the tyme and
 “ the said Sir Thomas and his foirsaidis their richt of presen-
 “ tatioun for that vice allenarlie sall fall in the handis of the
 “ mastéris and memberis of the said colledge *jure devoluto* and
 “ to the effect the saidis thrie burseris may be honestlie main-
 “ tened at the said colledge and for defreying the charges and
 “ expensis of their enterteinment the said Sir Thomas Burnett
 “ bindis and obleises him his airis and successouris als weill
 “ airis-maill as airis of lyne tailzie or provisioun and airis or
 “ successouris quhatsomever heritable and irredeemable to
 “ sell assigne analie and dispone lykeas by thir presentis he
 “ for himselff and his foresaids sells analies and dispones
 “ heritable for the enterteinment and maintenance of the thrie
 “ burseris above-writtin To the said Doctor William Guild
 “ principall of the said colledge and Mr. James Sandilandis
 “ civilist and commoun pr^ror of the samen and remanent
 “ masteris and memberis thereof and their successouris in that

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“ places all and haill those four croftis of land lyand about the
 “ burgh of Aberdeen heritable pertaining to him and disponit
 “ to him,” &c., “ with the haill fruittis proffittis and emolu-
 “ mentis of the saidis landis and croftis in all tyme cumming
 “ and the said Sir Thomas and his foresaidis assignis and
 “ disponis to the saidis masteris and memberis of the said
 “ colledge and their successouris all title and interest that they
 “ or their authors have had or anywyse may pretend to have in
 “ and to the said four croftis of land and pertinentis of the
 “ samen the saidis masteris of the said colledge thair entrie
 “ to the samen to have been and quhilk began at the feist and
 “ terme of Witsunday last bypast in this instant zeir of God
 “ J^mvi^c and fortie-aucht zeiris and so to continue *in perpetuum*
 “ in the peaceabill possessioun bruiking and josing of the
 “ samen but any troubill mollestatioun impediment obstacle or
 “ gaincalling quhatsomevir for the causes and upon the con-
 “ ditiouns above expresst and in respect the saidis masteris and
 “ memberis of the said colledge are superiouris of the croftis
 “ and otheris above-written of quhom the samen is and has been
 “ holden of the undoubtit superiouris thir many zeiris bygane
 “ and so far their securitie in the saidis landis and croftis they
 “ will not stand in neid of any new infestment be chartour and
 “ seasin in the samen but the said Sir Thomas his resignatioun
 “ of the samen in their hands as superiours for the causes
 “ above and efter specifit will be sufficient for thair securitie
 “ that the proppertie may be consolidat in the superioritie
 “ Thairfore and for performing of the said resignatioun the said
 “ Sir Thomas Burnet makis nominatis creattis constitutes and
 “ ordains

“ or any of them con·lie and
 “ sevrallie his verie lauchtful undoubted and irrevocabill pro-
 “ curatouris actouris factouris and speciall erend beireris givand
 “ grantand and committand to thame and everie ane of thame
 “ his express power mandat and bidding to pass to the per-

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“sonall presence of the principall common procuratour and
 “remanent memberis of the Kingis Colledge of Auld Aberdeen
 “undoubtit superiours of the said four croftis of land and thair
 “in his name and his foresaids with staff and bastoun and
 “due obeisance as becometh to resign renounce and upgive the
 “said four croftis of land with the hail houses biggings zairdis
 “partis and pendicles of the samen in thair handis as in the
 “handis of the immediat and undoubtit superiouris of the
 “samen to remane with them for the alieiment and entertein-
 “ment of the said thrie burseris and according to the provi-
 “siounes and conditiones above expresst *ad perpetuam rema-*
 “*nentiam* that in thair persons as superiouris now the proppertie
 “of the said four croftis and thir pertinentis may be consolidat
 “with the superioritie of the samen and that they resigne and
 “renounce all tittill richt or interest that the said Sir Thomas
 “Burnett or his foirsaidis has had or anywyse may pretend to
 “have to the said four croftis of land and their pertinentis
 “above written in favouris of the said masteris and memberis
 “of the said colledge for now and evir ffirmie and stable holding
 “and to hold what the saidis procuratouris or any of them sall
 “do in his name or his foresaidis and the said Sir Thomas
 “Burnett oblisses him and his foirsaidis to warrand this pre-
 “sent mortificatioun dispositioun and resignatioun fra his awin
 “propper fact and deid allenarlie that is to say that the said
 “Sir Thomas and his foirsaidis hes not nor sall not do any fact
 “or deid prejudiciall to thir presentis and the principall com-
 “moun procurator and remanent masteris and memberis of the
 “said colledge for themselffis and their successouris acceptis
 “of this present mortificatioun dispositioun and resignatioun
 “according to the conditiones and provisiounes above rehearset
 “and discharges the said Sir Thomas and his foirsaidis of all
 “bygane fewdewties preceding Witsunday J^mvi^c and fourtie-
 “aucht zeiris and the said Sir Thomas Burnett hes instantlie
 “delyverit to the said principall and commoun pro^r of the said

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“ colledge the haill wryttis and evidentis that he hes pertening
 “ or belonging to the saidis croftis excepting onlie the last
 “ chartour granted to himselff with the colledge confirmatioun
 “ of the samen quhiche he grantis him to have retenit not to
 “ prejudge the said colledge in any cais in thair securitie or
 “ that he myndis to reserve any richt of the saidis croftis to
 “ himselff or his foirsaidis in cais the memberis of the said
 “ colledge sall not fail in the performance of the conditiones
 “ of this present mortificatioun bot onlie in cais it suld happen
 “ the saidis masteris and memberis of the said colledge or thair
 “ successouris to invertte this present mortificatioun and not
 “ to observe the conditiones above rehearst that than he or his
 “ foirsaidis according to the claus above writtin may have ane
 “ eisie access and regress agane to the croftis and landis above
 “ specifeit and for the masteris and memberis of the said
 “ college thair securitie the said Sir Thomas obleisses himselff
 “ and his foirsaidis to give unto thame ane judiciall transumpt
 “ of the said chartour and ratificatioun of the samen quhenevir
 “ they sall be requyrit thereto.”

At the date of this contract and for seventy years afterwards, as alleged by the appellants, the yearly revenue of the four crofts conveyed by it was about 85*l.* 1*s.* Scots and previously to and at the date of the contract the college, as the superiors of the lands, were in the receipt of 20*l.* Scots, of feu duty out of this 85*l.* 1*s.* The original bursars founded by Bishop Elphinstone, who were referred to in the contract, were then receiving out of the general funds of the college 40*l.* Scots each, per annum, or 3*l.* 6*s.* 8*d.* sterling for their maintenance. And for seventy years after the date of the contract the college paid the Leys bursars the same sum as they were then paying to the college bursars, viz., 40*l.* Scots per annum, or 120*l.* for the three together.

In 1717 the college upon occasion of a royal visitation, returned the following answer to the visitors respecting these Leys bursars: “That Leys three bursars are maintained out

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“ of the rents of the crofts of land called Leys Great and Little
 “ Croft, and Collation Croft, the yearly produce whereof is 19½
 “ bolls of bear, which, *communibus annis*, can be reckoned no
 “ better than 8*l.* 5*s.*, at the estimate of 4*l.* 3*s.* 4*d.* per boll,
 “ though the college has, since anno 1648, when this mortifica-
 “ tion was made, paid yearly to each of these bursars 40*l.*, by
 “ which means, one year with another, by this mortification
 “ alone the college loseth about 40*l.* Scots, besides the yearly feu
 “ and casualties of superiority, of which the college were then
 “ superiors, which superiority as appeareth by the copy of the
 “ mortification in the Mortification Register, was resigned, and
 “ the masters of the college in the foresaid year, 1648, do, by
 “ this bargain, oblige themselves, and successors in office, to
 “ maintain these bursars *at the same rate that the other bursars*
 “ *then founded were maintained*, which indeed the masters have
 “ hitherto so religiously observed, that, to maintain these bursars
 “ annually, *they have actually lost by this annual deficiency of the*
 “ *mortification more than the stock of the mortification*, besides
 “ the accidental losses by broken tenants, by whom, anno 1700,
 “ there is lost no less than 72 bolls of bear, of which never a
 “ spoonful was recovered, as appears by the bill of rests of bear
 “ contained in the procuration accounts from Michaelmas 1698
 “ to Michaelmas 1700, by which it may evidently appear which
 “ way the college ran yearly in debt preceding and since anno
 “ 1695, which the masters cannot possibly help, unless a way
 “ be fallen upon for reducing and rectifying the mortification
 “ and contract made betwixt the Laird of Leys and the masters
 “ of the college in the foresaid year 1648, which, it is hoped,
 “ the honourable Commissioners will think of.”

According to the respondent, ever since 1717, the rent of the lands had been more than sufficient to defray the allowance to the bursars; but according to the appellants, there was then only a slight increase in the yearly rent, and, in 1752, a still further increase occurred, but the rents were still inadequate to the yearly allowance given the Leys bursars.

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In 1762, Lord Deskford, the Chancellor of the University, upon an application to him by the masters of the college, “determined that, for this year, each of the founded and Leys bursars shall be paid 60*l.* Scots, and that they shall continue to be paid at that rate, but subject to alterations, if, upon inspection of the college accounts, or from any unavoidable incidental expenses, it shall appear that the college funds are not able to afford them so much.” Thenceforth, the Leys bursars, along with the general bursars, were paid 60*l.* Scots each, out of the college funds, being equal to 5*l.* sterling. This income was thenceforth and is still given to the two sets of bursars, but they have ceased to be lodged and maintained within the college, as was required by Bishop Elphinstone in regard to his bursars. At what period this ceased was not stated.

Before the proceedings which are about to be mentioned, so early as 1804, according to the statement of the respondent, and as 1824, according to the admission of the appellants, the Leys crofts acquired a new value, by the demand for building-ground, in the neighbourhood of Aberdeen. The rent received from them in 1824 was 310*l.* per annum, and now had risen to 318*l.* Subsequently to this rise in the rents, the surplus, after providing for the payment to the Leys bursars, was thrown into the general funds of the college.

The respondent, who was the successor of the party to the contract of 1648, called upon the college to apply the whole of the improved rents of the Leys crofts to the Leys bursars. Upon their failure to comply with this request, he brought an action against them for reduction of the contract of 1648, because “the defenders have inverted, and are now inverting, the mortification made by the said deed, by refusing to receive the parties presented to be bursars upon the same by the pursuer, to the full benefit of the bursaries to which they were so presented, and by applying the funds of the mortification, or at least the greater part thereof, to their own use

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“ benefit, or at least to other purposes than the maintenance
 “ and entertainment of three bursars presented by the pursuer,
 “ as patron of the bursaries founded by the deed of mortifica-
 “ tion, to bursaries from the funds of the mortification; and
 “ because it is by the said deed specially provided and declared,
 “ that in the event of such an inversion of the mortification,
 “ the disposition and resignation contained in the said deed
 “ shall be null of itself, and of no force, strength nor effect, as
 “ if the same had never been made:” and to have it declared,
 “ that the inversion by the said defenders of the revenues of the
 “ crofts of land, mortified as above mentioned, from the main-
 “ tenance and entertainment of three bursars in the King’s
 “ College of Aberdeen, in terms of the above-mentioned deed
 “ of mortification, is illegal, and contrary to the will of the
 “ founder of the mortification, and that the pursuer is entitled,
 “ in consequence of the said inversion of the said revenue, to
 “ have regress to the said four crofts of land, and to make up
 “ titles to, and enter upon possession of the same, as heir of
 “ line of the said umquhile Sir Thomas Burnett, and to hold
 “ the same for the entertainment and maintenance of three
 “ bursars within the said college, to be presented to bursaries
 “ by the pursuer, as patron under the said deed of mortification,
 “ in terms of the deed.”

The summons was afterwards altered by amendment in these terms: “ or at least, and although the pursuer should not be
 “ found entitled to have regress to the said lands in manner above
 “ concluded for, it ought and should be found and declared,
 “ that the said defenders hold the said lands, and are bound to
 “ administer and apply the whole revenues of the same, for the
 “ behoof of three bursars to be presented from time to time by
 “ the pursuer and his successors, in terms of the said deed of
 “ mortification, and for the entertainment and maintenance of
 “ the said bursars of King’s College aforesaid.”

The appellants pleaded in defence to this action,—

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I. That, according to the true construction of the contract, they were only bound, as the consideration for which the crofts were disposed to them, to maintain three bursars, to be presented by the respondent or his successors, upon the same footing with the other bursars of philosophy at King's College, founded prior to 1648.

II. That this construction having been uniformly put upon the contract by all parties concerned, for nearly two centuries, any pretence for making a higher demand, or for insisting that they held the crofts on any other footing, was excluded by prescription, both positive and negative. By the positive prescription they had acquired a complete title to the crofts, upon continuing to pay the stipulated yearly consideration; and any pretence upon which the respondent could demand back the lands was excluded by the negative prescription.

III. The contract might competently be construed by the usage following upon it; and inveterate and uninterrupted usage supported the construction maintained by them.

IV. There was no ground for demanding reduction of the contract, and the conclusions to that effect in the summons were absurd.

V. According to any construction which could be put upon the contract, they would be entitled to apply the surplus revenue now arising from the lands, after paying the bursaries, to indemnify the college for the loss sustained by reason of the revenue having been so long inadequate to pay the stipulated bursaries, and of the college having been obliged to make up the deficiency out of their own funds; and as the whole surplus was inadequate for this purpose, and could never indemnify the loss, the action was groundless and unjust.

The Lord Ordinary, (*Cunninghame*), made avizandum to the Court upon cases by the parties, and on the 23rd February, 1844, the Court pronounced the following interlocutor: "Find
" and declare, in terms of the amended declaratory conclusion

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“ of the summons, that the defenders hold the lands referred to
 “ in the summons, and are bound to administer and apply the
 “ whole revenues of the same for the behoof of three bursars,
 “ to be presented from time to time by the pursuer and his
 “ successors, in terms of the deed of mortification, and for the
 “ entertainment and maintenance of the said bursars of King’s
 “ College; and in so far repel the defences, and decern: of
 “ consent of the pursuer, find it unnecessary to pronounce any
 “ deliverance respecting the other conclusions of the summons.”

This interlocutor was appealed from.

Mr. James Parker and *Mr. Mc Pherson* for the Appellants.
 —I. The deed of 1648 is not a purely gratuitous mortification, but it is, as its form purports, of the mixed nature of a contract and a charter. It sets out as a contract between the parties, whereby Burnett contracts that he will convey the lands in question to the college, upon condition that the college will allow him to found three bursaries, and will undertake to educate, bring up, and maintain the bursars, not in such a condition as the rents of the lands would afford, but “ according to
 “ the manner, measour and qualitie, and as the rest of the bur-
 “ series of philosophie presentlie in the said college alreddie
 “ foundit are educat and entertenit.” And on the other hand the college, in consideration of the conveyance of the land, agrees to discharge Burnett of all arrears of feu duties owing in respect of the lands, and of all subsequent feu duties, and to allow him and his successors to nominate the bursars, and undertakes to educate and maintain them in the way prescribed.

Viewing the arrangement as a contract, no breach is alleged. The college have never refused any nominee presented to them, nor have they ever failed to educate and entertain the nominees in the same way as the earlier bursars. During more than a century, while the rent of the lands was not adequate to this expense, they did not make the condition of the bursars pro-

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portionally worse, because their contract was precise and independent of the adequacy or inadequacy of the rents, that the bursars should be educated and maintained in a manner defined and ascertained; so, on the other hand, when, by the improvement of the lands the rent became more than adequate for the expense, the condition of the bursars has not been proportionally improved, and for the same reason, because their condition was ascertained and fixed by the contract. In all this there was no breach of the contract, but an adherence to it.

II. But viewing the deed of 1648 as a gratuitous unilateral mortification, the principles of law applicable to such grants are well established in England, though not so well ascertained in Scotland, and will equally defeat the claim set up by the respondent. The rule, in construing all instruments of this kind, is the intention of the granter, that was laid down by *Lord Eldon*, in the *Attorney-General v. Mayor of Bristol*, 2 *Jac. & Wal.* 317. But the Courts have adopted certain rules of construction in the attempt to discover the intention of the donor. One of these is, that where the whole estate is given and apportioned by the donor himself among charitable objects, so as to exhaust the annual value at the time of the gift, that circumstance is evidence of an intention to give any increased value to the same objects. *Thetford School Case*, 8 *Co. Rep.* 130; for as *Lord Eldon*, commenting upon that case, in *Attorney-General v. Skinners' Company*, 2 *Russ.* 435, said, "If a testator, by his will, gives the whole of the then value of the lands to charitable purposes therein expressed, denoting upon his will that he knows what is the whole value of the lands, giving the yearly value is equivalent to giving the rents and profits, and giving the rents and profits is equivalent to giving the lands themselves." And in another passage, his lordship says,—"There are many cases which have decided, that, where it appears on the will itself, what was the yearly value of the estates given to charitable purposes,

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“ and the testator has parcelled among the different charities
 “ the whole of that yearly rent or value, so attributed to the
 “ property, any future increase of rents must go to charity.
 “ The Court seems to have said, that the testator has himself
 “ declared what constitutes the whole of the estate, and that, in
 “ parcelling out his dispositions to charity, he has exhausted in
 “ charity what he himself has said constitutes the whole of the
 “ estate; and from the circumstance of his knowing what was
 “ the then present value of the estate, and devoting it exclu-
 “ sively to charity, we have inferred an intention on his part
 “ that the whole of the estate should be given to charitable
 “ purposes.”

The decision in the *Thetford Case* was followed in *Attorney-General v. Wilson*, 3 My. & K. 372.

Another rule is, that where a testator expresses upon his will an intention to devote the whole estate to charity, and, without showing upon the face of the will that he is aware of the annual value, gives so much annually as falls short of the entire annual value, and does not dispose of the surplus, the surplus shall go to the charities mentioned and not to the heir-at-law,—charity being the object of the gift, and no other object being declared, *Arnold v. Attorney-General, Duke's Char. Uses*, 591. Upon which case, *Lord Eldon*, in *Attorney-General v. Skinners' Company*, 2 Russ. 442, makes this observation,—“The Court has said, that though the testa-
 “ tor has not pointed out what was the yearly value of the
 “ lands, yet if he has otherwise sufficiently manifested his inten-
 “ tion to give the whole of the estate to charitable purposes,
 “ the increased rents must be applied to the charitable uses
 “ which he has mentioned.”

Another rule is that where a testator, without any expression of charity being his sole object, gives the whole estate, and directs certain specified sums, which do not exhaust the annual profits, to be paid out of them to charity, the payments directed are to

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be taken merely as charges upon the gift; and either the surplus goes to the donee of the estate, or there is a resulting trust for the heir of the donor, *Attorney-General v. Mayor of Bristol*, 2 *Jac. & Walk.* 294; *Attorney-General v. Fishmongers' Company*, 5 *My. & Cr.* 11. In the two first cases, the donees were likewise objects of the charity; but this, it was observed, made no difference in the application of the principle. A case similar to these was the *Attorney-General v. Cordwainers' Company*, 3 *My. & K.* 534, where there was a gift, with directions to make payments to charities, which did not exhaust the rents at the time, and a gift over, in case of non-performance. There the donees were held not to be trustees bound to apply the improved rental in augmentation of the gifts to the charities; but to be donees upon condition, entitled to apply the surplus to their own use, after making the specific payments directed by the gift; and to the same effect was the *Attorney-General v. Grocers' Company*, 6 *Bea.* 526. There the testator, after declaring his intention to found a grammar-school, specifying the provision for the master and usher, and for seven poor men, "and that for the said godly intent he had taken order, and "that it was agreed" between him and the Grocers' Company, continued thus,—“And minding the accomplishment of all the “premises, and to have the same take effect, according to his “full mind and intent,” therefore he devised the premises to the company, “upon the condition and intent” that they should provide the school, and make the master, usher, and poor men, certain specified payments, which were under the amount of the rental at the time of the gift, and greatly under the improved rental. Yet, although the payments, from the change in the value of money, were admitted to be inadequate to the purposes for which they were directed, the surplus rent was found to belong to the donees of the land for their own use, as being donees upon condition.

The present case comes under the last class of cases which

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has been mentioned. Burnett agrees with the college, that there shall be a foundation of three bursars, to be educated and maintained in a specified manner, that is, according to the manner in which the bursars already founded were educated and maintained. It might have been a question whether, if the college kept the condition of these new bursars until the present day the same as the condition of the original bursars was at the date of the gift, they did not comply with the terms of the gift. But they have not done so; when they have improved the condition of the one set of bursars, they have made a corresponding improvement in the condition of the other set. Burnett's intention being then to have three bursars educated and maintained in a specified manner, "to the effect the said three burseris may be honestly maintained at the said college, and for defraying the charges and expensis of their entertainment," he disposes "for the entertainment and maintenance of the burseris above written," the lands in question, "for the causes and upon the conditions above expresst." And by the procuratory of resignation, the lands are to be resigned, "for the aliment and entertainment of the said three burseris, and according to the provisions and conditions above expresst." That is, not for the aliment and maintenance of three bursars generally, but for their aliment and entertainment "according to the maner and measour and qualitie, and as" the original bursars were "educat and entertenit," which were "the provisions and conditions above expresst."

The gift, therefore, is out and out to the college, under burden only of a fixed payment,—a payment as certain and capable of being ascertained as if it had been specified in money sterling. Upon the authority of the cases which have been cited, therefore, the college is not a trustee merely of the lands to apply the rents, whatever their amount may grow to, on the objects of the charity, but a donee under burden of specified payments, with an absolute right to the surplus.

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It is no doubt true that the payments specified exhausted the rents as they existed at the time of the gift, which in the *Thetford Case*, and *Attorney-General v. Wilson*, was taken as indication of intention to give the whole estate to charity, because nothing over was left for any other purpose: but here the payments did more than exhaust the rents. The rents, at the time of the gift, were unquestionably inadequate to maintain the bursars in the manner specified. That evidence, therefore, from correspondence between the amount of the rents and the amount of the payments, of intention to give the whole to the objects of the payment, which was the ground of decision in these cases, is wanting in this. This circumstance of the inadequacy of the rents, goes far to show that the case is not one of gratuitous mortification, but of contract between the parties. At all events, the deed is a gift, upon condition to make the payments,—the donee taking his chance whether the profits will be adequate to discharge them, and having the benefit of any emerging surplus. If the college, while the rents were insufficient, was bound to make up the deficiency, the conveyance must have been without reference to the amount of the rents, one way or other.

III. The inadequacy of the rents was known to Burnett and to his heirs after him; yet with their knowledge, the college maintained the bursars in the manner stipulated, at an annual loss; and when the rents became more than adequate, the college, with the knowledge of Burnett's heirs, applied the surplus to its own use. This contemporaneous and continued understanding of their relative obligations, by the parties themselves, though not conclusive, goes far to show the true meaning of the deed, and will make the House astute to support the construction which the parties have themselves put upon it.

With regard to the *Perth Hospital v. Butter's Mortification*, *Bell's fol. Cases*, 173, and *Ramsay v. College of St. Andrews*, 4 *B. M. & D.* 1366,—the only cases which have occurred upon this subject in Scotland, the gift in both of them was of the

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entire estate to the objects of the charity, to be divided equally among them, so that any question of a right in the donees of the lands to the improved rent was out of the question, and indeed was not raised in *Ramsay's Case*, for there the question was, whether the trustees of the charity were entitled to increase the objects of the charity, because of the increase of the revenue.

Mr. Solicitor-General, (Kelly,) and Mr. Bethel for the Respondent.—I. Although the deed uses the expression “con-tractat endit, and finally aggregit,” there is nothing in its structure which gives it the character of a contract. Although the object is expressed to be the education and maintenance of bursaries there is no obligation, by the college, either to maintain or to educate; there is nothing upon which either Burnett or his heirs could have maintained an action to compel performance. Neither is there any condition for re-entry in case of non-performance.

[*Lord Cottenham.*—If the income had been insufficient, do you carry the argument the length of saying that the college could have reduced the benefit afforded?]

Yes, or they might have reduced the number of bursars. There is no contract that they shall maintain the bursars, whatever may be the produce of the land. If the lands had been washed away by a river or the sea, where would have been the obligation to continue the benefit of the charity? What is said in the outset of the deed as to the motives of Burnett, is not contract or agreement, it is mere recital of what had led to his execution of the deed. But, even if there were a positive contract, it would not follow that the surplus rent would go to the college beneficially.

II. The deed, in truth, is a gift, upon trust, for the benefit of charity, and any surplus of the revenue, over the benefits specifically given, must be applied for the objects of the charity. Where the gift is of what is insufficient, or no more than suffi-

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cient, for the purpose intended, any surplus afterwards arising goes to the object of the charity. It is only where there is a surplus at the time of the gift, that the donee in trust takes the benefit of it. But here the whole is given for the purpose pointed out, and there are no terms of independent conveyance used, no words of conveyance which are not followed by or in immediate connexion with words specially pointing out the objects intended to be benefited: “to the effect the said “three burseris may be honestlie maintained,” the granter obliges himself to convey, and when he comes to convey, it is “for the enterテインment and maintenance of the thrie burseris “above written.” And the resignation is, that the lands may remain “for the aliment and enterテインment of the said thrie “burseris.”

[*Lord Cottenham.*—If the object was merely to apply the rent for maintenance of three bursars, what possible object was there in referring to the other bursaries?]

As descriptive of the mode of maintenance.

[*Lord Cottenham.*—If they were merely to have the rents among them, then that was quite immaterial.]

The gift was of a small sum, not sufficient for, but to go in aid of sustentation; the recital of the deed is “for the “supplie and help of some poor ones that cannot be abill “to maintene themselves.” The object of the mortification is the entertainment and education of the bursars, so far as the rents would go, and, in a manner, as nearly similar to the other bursars as the means would admit. But there is no condition that they shall be maintained up to that scale, and not beyond it if the funds would allow. The only condition is in regard to the time and manner of presentation, and the acceptance, by the college, of the patron’s nominees. Accordingly, being of this gratuitous nature, the warrandice is confined to the acts and deeds of the granter only. If, therefore, the rents exceed what would be necessary for the maintenance of

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the bursars, in the manner indicated, there being no other object than their benefit expressed in the gift, the surplus must go either to the improvement of their condition, or be a resulting-trust for the heir of the founder.

The rents at the date of the grant, the appellants say, were not sufficient for the purpose; of this there is no proof, but, at all events, they were not more than sufficient; the only intention of the founder, therefore, must have been to give the whole for the benefit of the charity. In the *Perth* case, *Bell's fol. Cases*, 173, the gift was for the maintenance of four poor persons, and it was held that the whole rents, though greatly increased in amount, must be applied to the charity, and could not be appropriated by the donees of the land.

[*Lord Cottenham*.—There there was no restriction as to the amount of benefit to be received by each object?]

Except that it was for the maintenance of four poor people in the hospital, who, of course, were to be maintained in the same manner as the other persons already in the hospital. So also in the *Thetford Case*, 8 *Co. Rep.*, the whole rents, as then existing, were given to be distributed in specific sums, but the rent having increased, the surplus was directed to be applied in increasing the benefit to the objects of the charity, and to the increase of the number of objects; so here the rents are given for the sustentation of three bursars, in the same manner as the other bursars, and the rents having increased, they should have the surplus among them. If a gift to charity of the whole rent, which at the time is only adequate for the purpose for which it is given, implies a gift to the charity of the whole estate, and, as a consequence, a gift of any increase in its value, by the same reasoning a gift of the whole estate, where the rents at the time are inadequate for the charity, must imply a devotion of the entire estate to charity.

[*Lord Cottenham*.—Where there is, at the time, an apparent surplus beyond the object of charity, a gift of the whole estate is, in effect, a gift of the surplus to the donee.]

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In all the cases which have been relied on by the appellants, there was either a gift with a surplus, or there were particular terms used in the gift, upon which the judgment was founded.

III. With regard to the practice under the deed, as assisting to discover its construction, there is no evidence of what is alleged, that the rents were either inadequate or more than adequate; the presumption, on the other hand, is, that they were just adequate, and no more; but, however much contemporaneous usage may be admissible to assist in the construction of a deed, doubtful or ambiguous in its terms, there is no room for its introduction here, as the deed is plain and unambiguous, and so far as the usage is contrary to the terms it is inadmissible to overrule its plain import. *Ramsay v. College of St. Andrews*, 4 *D. B. & M.* 1366, where usage for upwards of forty years was not allowed to prevail against the obvious terms of the deed of mortification.

LORD CHANCELLOR. (*Cottenham.*)—My Lords, differing as I do from the opinions of the majority of the Judges of the Court of Session, by whom the interlocutors appealed from were pronounced, it is satisfactory to me that the question does not turn upon any principle peculiar to the law of Scotland, but upon the construction to be put upon the instrument by which the charity was founded, to be regulated indeed by rules laid down in former decisions, of which none have been quoted from the decisions in Scotland directly applicable to the present case, but of which many are to be found in the reports of cases in England.

It is important in cases of this description, that the rules of construction should, as far as possible, be the same in the two jurisdictions; and I cannot find, in the present instance, any difficulty in applying the well-established rules, which have been adopted and acted upon in this country, to the decision of the Court of Session. In so doing, no principle which has been adopted or acted upon in Scotland will be infringed upon, nor any decision affected.

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It is unnecessary to go higher than the decision of Lord Eldon in the *Attorney-General v. Corporation of Bristol*, in 2 *Jac. & Wal.* 320. In that case that very learned Judge reviewed the former decisions from the earliest time, and extracted from them rules which he acted upon, and which have been the guide to all Judges who have followed him. He held the donees of the fund entitled to the surplus which was not otherwise disposed of, they having covenanted to apply the income in certain specified payments to certain charities, of one of which they were the trustees. And he said that “intention” was the principle, and that the several rules were only indexes “of the intention;” that one of those rules was, that if the donees were to lose, if the fund showed decrease in value, they ought to gain if it increased; and he came to the conclusion that the fund was given to the corporate body, subject to the charge imposed, and not as mere trustees.

In the *Attorney-General v. Cordwainers' Company*, 3 *My. & K.* 535, the devise was to a corporation for the purposes of the testator's will, and he gave half of the rents to his brother for life, and directed that the devisees, out of the remainder, should pay certain specified charities, and he gave the whole to his brother in fee, if the corporation should neglect to perform his will. Sir John Leach, Master of the Rolls, thus expressed himself: “This is a gift upon condition, and not “merely a trust; the condition of forfeiture proves the intention to give a benefit, the imposition of a penalty for non-performance of a condition, implies a benefit, if the condition be “performed.”

In the *Attorney-General v. Smythies*, in 2 *Rus. & My.* 717, the corporation consisted of one warden and five poor brothers; and it was directed that out of the rents 2*l.* 12*s.* yearly should be paid to each poor brother, and that the remainder should be applied to support the warden and poor of the hospital, and for repairs. Lord Brougham said, “If a fund be given to one

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“ body, subject to certain payments to other parties, the latter
“ can only take what is given as a charge, and the surplus must
“ go to the donee of the fund, unless there be circumstances
“ clearly indicating a contrary intention.” Many other cases
might be referred to, confirmatory of these rules.

In the *Attorney-General v. Fishmongers' Company*, 5 My. & Cr. 11 & 16, I had occasion to consider these decisions, and recognized the doctrine upon which they were grounded.

The result of these decisions is, that, generally speaking, in searching for the intention of the donor, it will be assumed to have been to confer a benefit upon the donee, in the enjoyment of any increase of the fund. 1st. If the gift be to the donee, subject to certain payments to others. 2ndly, If the gift be upon condition of making certain payments, subject to a forfeiture upon non-performance of the condition; or 3rd. If the donee might be a loser by the insufficiency of the fund, which indeed is consequential upon the last. In the present case all these rules concur.

Independently of which, there are provisions and expressions strongly confirmatory of the intention in favour of the college. It is not a gift, but an agreement, for which some pecuniary consideration was given to the college, who were the superiors, to release to their vassal the donor, certain feu duties then due. The deed expresses the motives for the gift, which are: 1st. The promotion of learning generally. 2nd. Giving instructions to those who could not afford to purchase it; and 3rd. The donor's respect and affection for the college. It then provides, that the three bursars of philosophy are to be maintained and educated, according to the manner, measure and quality, and as the rest of the bursars of philosophy presently in the college already founded, are educated and entertained; and it provides for the presentation to three bursarships by the donor and his family, upon pain of forfeiture of the gift by the college, if they shall not give effect to it. The donor then, for the considera-

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tion and upon the conditions before expressed, resigns to his superior, the college, the lands in question, and warrants the same against his own acts; and the college accepts it according to the conditions and provisions before rehearsed, and discharges the feu duties from a certain day; and it is stipulated that the donor shall retain the last charter and confirmation of it by the college, not for the purpose of reserving any title or interest in case the college shall not fail in the performance of the conditions of that mortification, but only in case they should invert that mortification, and not observe the conditions above rehearsed, than that the donor might the more easily reenter to the property.

It is here that, before the granting part of the deed, it is said, "To the effect the said three bursars may be honestly maintained at the said college, and for defraying the charges and expenses of their entertainment," the donor bound himself and his heirs to sell and dispose, and did thereby sell and dispose, for the entertainment and maintenance of the three bursars above written, the lands in question; terms, which, standing alone, might seem to devote the whole to the maintenance of the three bursars; but it proceeds "to remain with them for the aliment and entertainment of the said three bursars, and according to the provisions and conditions above expressed," which refers to the recital of the agreement providing that "those three bursars shall be brought up, educated, and maintained according to the manner, measure, and quality, and as the rest of the bursars presently in the college." This reference to the manner, measure, and quality of the education and maintenance of the bursars already existing, fixes and limits the measure of expenditure to be bestowed upon the three thereby endowed, as effectually as if specified sums had been directed to be so applied for that purpose; but this does not appear to have been sufficiently attended to in the former stage of this cause, which may account for the Perth Case in *Bell's fol. Cases*,

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173, having been referred to as not only applicable to but as governing this case, whereas it wants the important fact upon which this case principally turns, namely, the limit of the expenditure to be bestowed upon the first object of the gift. In that case the lands were conveyed for the maintenance of four poor persons in the hospital for ever; and after enumerating the reserved rents of those lands it proceeded in this way, “which
“ yearly rent and duty the founder willed, required, and desired
“ to be employed, used, and bestowed, for and towards the
“ sustentation and maintenance in the said hospital of the said
“ four poor persons.” In this there is no limit by reference or otherwise, as to the extent to which the poor persons were to be endowed with the rents, but all the rents then receivable were to be applied for their benefit. That case wants every circumstance which leads to a similar conclusion in the present case which is a gift to one charitable institution, subject to a condition for payment of certain sums for the benefit of others, whether the income falls short of or exceeds such sums, and with a proviso of forfeiture upon non-performance of the condition; embracing therefore, within itself, all the grounds upon which it has been held in the cases before referred to, as decided in England, that the donees are entitled to the increase of the rents, and not opposed by any case in Scotland. The object, indeed, and the principle to be applied, must be the same in both countries, namely, to discover and act upon the intention of the donor: and it would have been unfortunate if different rules had been adopted in the two jurisdictions, for the purpose of carrying this principle into effect. Fortunately that is not the case; and it is therefore open to us and it is most desirable to apply to Scotland principles which have been so well established in England, and which appear to be best calculated to effect the common purposes of both jurisdictions.

Being of opinion that the Court below have not put a right construction upon the deed of endowment, it is unnecessary to

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advert to the usage which has prevailed, amounting to a contemporaneous exposition of the meaning and intention of the parties. And I will say, that nothing advanced in argument in this case has induced me to hesitate as to the importance and correctness of the rule to which I alluded upon this point, in the case of *Attorney-General v. Fishmongers' Company*, 5 My. & C. 18. I therefore move your lordships to reverse the interlocutor appealed from, and in lieu thereof to assoilzie the appellant from the conclusions of the libel, with the costs of the suit; but of course without any costs of the appeal.

LORD CAMPBELL.—My Lords, I entirely concur in the view taken on the subject by my noble and learned friend. It seems to me quite clear that the donor here has most anxiously provided, that these three bursars should, in all time to come, be upon the same footing as the rest; that there should be no difference made. According to his notion, the privations which they might still be subject to, he thought, might stimulate their industry, and might bring them under a discipline, which according to his notion, might fit them for acting a useful part in life. Then, it being quite clear that you would violate the intention of the donor, if you were to put these bursars on a better footing than the other bursars of the college, I think that the construction which would give the whole of the increased rents and profits to these three bursars, could not possibly be the right construction to be put upon this instrument. Looking to the whole transaction, it seems to me that it was a kind of bargain between the donor and the college; for better or for worse the college undertook that if the rents and profits should fall off, still those three bursars should remain on the footing of the other bursars of the college, if the rents and profits should increase, the college, the donees, should enjoy the benefit of the increase. I am therefore entirely of opinion with my noble and learned friend, that the interlocutors appealed from should be reversed.

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My noble and learned friend clearly showed that the *Perth* case, which was relied upon, had no application to the present, and I am sure as little application had the *St. Andrew's* case; there it was quite clear that there were words expressly used and most anxiously used, just the very reverse of these indicating that the bursars who were established should have the whole of the profits, be they great or be they small.

It is ordered and adjudged that the said interlocutor complained of in the said appeal be, and the same is hereby, reversed, and that the said appellants, (defendants,) be assoilzied from the whole conclusions of the summons mentioned in the appeal, and that the respondent do pay to the appellants, (defendants,) their costs in the proceedings in the Court of Session, before bringing this appeal; And it is further ordered, that the said cause be remitted back to the Court of Session in Scotland, to do therein as shall be just and consistent with this judgment.

G. and T. W. WEBSTER—RICHARDSON and CONNELL, Agents.
