

FEBRUARY 10, 1805.

WILLIAM ANDERSON and Others, *Appellants*, v. THE INCORPORATION OF WRIGHTS OF GLASGOW, *Respondents*.

Charity—Incorporation—Purposes of Trust—Misapplication—Education of Children—*An incorporation of a trade was empowered to raise funds to be bestowed on the "common charges of the craft, and to the support of the poor decayed brethren thereof." A testator having bequeathed funds to assist in founding an industrial school for boys not crippled or deformed, the incorporation subscribed £100 towards the institution, the boys of members being eligible to the school.* HELD (affirming judgment), *That this application of the funds was not ultra vires and illegal, for the education and support of the boys were a relief to the parents and for the benefit of the brethren generally.*

*In administering the funds of a charity, care must be taken, that they be not applied to a different form of charity; that they be not used for devolving the duty of administration upon another body; that the sum otherwise applied be not so large as to trench on the necessary expenses; that established modes of distribution be not lightly departed from. And in a trust for decayed brethren it is not necessary, that each should receive precisely the same benefit.*<sup>1</sup>

The Incorporation of Wrights of Glasgow is one of the fourteen incorporated trades or crafts in that city. It has three representatives in the Trades' House of Glasgow, a body composed of representatives, varying in number from five to two, from each of the incorporated trades, and of a deacon, convener, etc. elected by the House.

By seal of cause dated 3d May 1600, and granted by the Provost and Magistrates of Glasgow, the Wright craft of that city, which had previously been united in one "Letter of Deaconry" or seal of cause, with the coopers and masons, was separated from these bodies, and obtained a grant or ratification of certain articles of incorporation. This seal of cause proceeded on a narrative of a supplication by the brethren of craft to the Provost and Magistrates, and set forth, *inter alia*—

"Therefore, following forth your Lordships' interlocutor for the causes above written, and for the loving of God Almighty, Father, Son, and Holy Ghost, the common weal of this good town, and the profit of all and sundry our Sovereign Lord's lieges repairing thereto, and for the support and help of our poor decayed brethren of craft, failed in goods, both present and to come, and for relief and sustaining of a part of our common charges, laid and to be laid, upon our said craft, we desire, that we may have these articles, statutes, and rules following given and granted to us by your Lordships' authority, whereby good rule and guiding may be among us and our successors of the said craft, both masters and servants, in time to come, for the common weal of the town, and setting forward of us and our said brethren, and avoiding of confusion and inconveniences which in times bypast have been to our disprofit, namely, by sumptuous banquets, which each freeman of our craft was wont to make at their entry and upset of their booths, which we are willing to remit and discharge as unprofitable in time coming, and alter the same into money, which will be less than they spend before, to be bestowed upon our common charges, and for support of our poor decayed brethren of craft, and to avoid plurality and multitude, which create confusion. . . . *Item*, In the first, that it shall be lawful to the whole brethren of the said craft to choose a deacon, most qualified and worthy, yearly, once in the year. . . . *Item*, That no persons of the said craft, contained in this present letter, set up booth to work within this city, until he be first made burgess and freeman of the same, and be examined, etc. . . . And thereafter, before he be admitted to set up booth, shall pay for his upset as follows, viz.—Gif he be a burgess and freeman's son of the said city, and apprentice within the same, shall pay of upset the sum of five merks money; and if he be a burgess' son of the town, and was apprentice not within but without the same: or if he be a stranger's son, and apprentice within the town, each one of them shall pay of upset the sum of ten merks money; and if he be a stranger and unfreeman, not being apprentice nor freeman's son within the town, shall pay the sum of twenty pounds money of upset. All to be paid incontinent to the box of the said craft, to be bestowed upon the common charges of their craft, and to the support of the poor decayed brethren thereof. Which sums

<sup>1</sup> See previous report 1 Macph. 152: 35 Sc. Jur. 89. S. C. 3 Macph. H. L. 1: 37 Sc. Jur. 236.

being compared with the banquet of old, and now in tyme coming discharged, are of less value than they were before, but redounds more to the profit of the said crafts. *Item*, That every apprentice at his entry to the said craft, if he be a freeman's son of the said city, shall pay the sum of twenty shillings money; and if he be an unfreeman's son, he shall pay the sum of forty shillings money to the said box, to be bestowed as said is." . . .

"*Item*, It is statute and ordained, . . . that the said deacon and masters of craft, with the advice of the best and worthiest of the same craft, shall have power to make acts and statutes for their own craft, for the common weal and profit of the said burgh and city, and support of their poor decayed brethren in all time coming, as behoves and becomes them to do. . . .

"Which statutes, articles, and rules above written, being frequently heard, read, understood, and maturely advised with and considered, they found first, to the glory of God, the common weal of our Sovereign Lord's lieges, and also of the said burgh and city, and for good order in time coming to be had among the said craftsmen, and to the profit of them and their poor decayed brethren of craft and relief of a part of their common charges, we, the said Provost, Bailies, and Council, have ratified, approved, granted, and confirmed," etc.

By certain bye laws, stated to have been passed in September 1849, it was provided, *inter alia*—"1. The funds of the Incorporation of Wrights shall be exclusively appropriated to charitable and benevolent purposes, and principally in giving pecuniary aid to indigent members, and the widows and orphans of members; and it shall not be lawful to break up or dissolve this incorporation, or to divert its funds from these their legitimate objects. 2. The funds shall be invested in the purchase of lands, houses, . . . 3. No sum exceeding two guineas shall be invested in purchases, or granted to any benevolent institution, unless the proposal be made and seconded at one meeting of the master court, and approved of and confirmed by a majority of the Court at a subsequent meeting, in calling which the nature of the proposed investment or grant shall be specially intimated. No permanent investment of any sum exceeding £500 shall be made without the consent of the trade. 4. The annual expenditure shall be so regulated as not to exceed the revenue; but should it happen to do so in any one year, the expenditure must be gradually diminished during the three following years, to make up the deficiency, so that the capital may remain entire. 5. The affairs of the incorporation shall be managed as heretofore by the master court, consisting of the deacon, collector, late deacon, and late collector, ten trades' masters, and two key keepers, of whom nine shall be a quorum. The master court shall have the assistance of a clerk and an officer. . . . 9. The deacon shall call a general meeting of the incorporation, for the Lammas court, on the first Friday after the 15th day of August; and another on the first Friday after the 15th day of September, for the election of deacon and other office bearers, and for any other business. He shall also be bound to call a general meeting for the consideration of any subject that may be supposed to affect the interests of the incorporation, on receiving a written requisition to that effect, signed by not fewer than twelve qualified members, setting forth the particular object of the meeting. . . .

"30. Any proposal for altering these rules must be made in writing, signed by twelve qualified members, and delivered to the deacon; after which the same must be read at the next meeting of the master court; and thereafter, at the next stated meeting of the incorporation; after which, a special general meeting of the incorporation shall be held for the purpose of disposing of such proposal, not sooner than two months after the said stated general meeting; and unless such proposal shall be carried by a majority equal to two thirds of the qualified members present at such meeting, the same shall not be adopted. Further, it shall be incompetent to alter any rule, or make any new rule or regulation, having in view the dissolution of the incorporation, or the appropriation of its funds, or any part thereof, to other purposes than those hereinbefore described."

At a meeting of the master court on 27th December 1858, it was resolved—"That the court should recommend the trade to give £100 towards the expense of the buildings in connexion with the bequest of the late James Buchanan, Esquire, to the city, for maintaining, educating, and instructing destitute boys in Glasgow; and the clerk was ordered to call a general meeting of the trade, to be held in the Trades' Hall, on Friday the 7th day of January next, at three o'clock, for the purpose of considering the matter, and to decide thereon."

At the meeting of the incorporation on 7th January 1859, a motion to approve of the above recommendation of the master court was lost by a majority of one, seventeen voting in favour of it, and eighteen against it. At a subsequent meeting held 8th April 1859, for the purpose of reconsidering the vote of last meeting, it was rescinded by a majority of fifty two to twenty three, and the motion to give £100 to the Buchanan Institution being renewed, was carried by forty three to twenty.

W. Anderson and others, part of the minority at the meeting of 8th April 1859, took the present proceedings to interdict the Incorporation of Wrights from applying their funds towards the Buchanan Institution.

The Court of Session held that the contribution in question was not illegal. The pursuers thereupon appealed from the interlocutors to the House of Lords.

The appellants, in their *printed case*, submitted that the interlocutors should be reversed—

1. Because the resolution of the Incorporation of Wrights was illegal, in respect, that the funds were thereby diverted to an object not sanctioned by the seal of cause or charter of the incorporation.
2. The bye law of 1849 was *ultra vires* and illegal, in so far as it authorized the appropriation of the funds to charitable and benevolent purposes generally; at all events, it was illegal to authorize the appropriation of the funds to any other than to the support of decayed brethren when the funds are not sufficient to afford adequate support to the decayed brethren on the roll.
3. The bye laws were illegal and not binding on the incorporation, in respect, that they were never agreed to, duly made, passed, or authenticated in terms of the seal of cause, and were not sanctioned by the magistrates of Glasgow or the Court of Session.

*Rolt Q.C., Anderson Q.C., and Wotherspoon*, for the appellants.—This application of the funds was illegal and *ultra vires*. The sole legitimate objects of the trust, as declared by the seal of cause, were the common charges, and the support of poor decayed brethren of the craft. Though the Buchanan Institution may be a laudable institution, yet it did not benefit poor decayed brethren but only their children, and not even all their children, but only boys, and those who were not crippled or deformed. Instead of benefiting the brethren generally, it will prejudice them, for it will reduce their weekly allowance. The Courts in Scotland hold trustees of charities as strictly within the purposes of their charity as the Court of Chancery does in England—*Ellis v. Henderson*, 3 Bell's App. 1. It had been said, that the present application of the funds was in conformity with usage; but usage, unless it amount to contemporaneous exposition, goes for nothing, being merely a series of repeated breaches of trust. It might be said, that the diversion of funds here was slight, but in such cases it was the duty of the Court to draw the line strictly, otherwise abuses would inevitably creep in.

The *Attorney General* (Palmer), and *Sir H. Cairns Q.C.*, for the respondents, were not called upon.

LORD CHANCELLOR WESTBURY.—My Lords, although I regret the consequences of this appeal to the appellant, yet I desire to speak with respect of the motive that has prompted him in this litigation. It is quite clear, that he has proceeded upon a conscientious conviction, that this proceeding on the part of the guild is at variance with the charitable purpose for which it was originally constituted. My Lords, in that conclusion, I think that the appellant is entirely wrong. It unquestionably is a matter of great regret, that there should have been founded upon the appropriation of this small sum of money a litigation extending to two actions, and to two appeals, including this appeal to your Lordships' House, expensive as these proceedings must have been. My Lords, the question before the House is simply this: Does this appropriation of the sum of £100 fall within the compass of the charity trust contained in the deed of constitution of this guild, denominated in Scotland "The Seal of Cause"?

I reject entirely from my consideration of the matter the bye laws; I think it unnecessary to take them into consideration. If the bye law be not in conformity with the trust, it may be disregarded, and if it be in conformity with the trust, it is nothing more than an expression of the purpose of the trust, which I would rather take from the language of the trust itself.

Now this original Guild or Society of Wrights was established a great many years ago—I think in the year 1600. And in conformity with the general purpose which is found in the constitution of most of those societies, provision is made for the accumulation of the funds to be derived from fees paid on the entrance of members, and from other sources, and there is a dedication of those funds, first, to the common charges of maintaining the society, and then "to the support of the poor decayed brethren thereof."

Now, these words, "the support of the poor decayed brethren thereof," are expressive of the general purpose of the charity, which may be carried out in a variety of forms of administration. Those words define no particular mode of applying that fund; they admit of variation according to the circumstances of the case. The particular question, that we have before us now is, whether the application of a part of those funds for the education of the sons of poor decayed members of the society would or would not be an application falling within the general scope and ambit of those expressions that indicate the general purpose. Upon that point I think there cannot be any possibility of doubt. If one were to select a form of application of a charitable fund for the benefit of a poor man, one could probably select none that would be more advantageous than the application of the fund to the education of his children. It is not only a relief to the parent, but it is a direct and positive benefit to the child, and in such a mode of application, therefore, you have the advantage of combining two objects. While the parent is relieved by the money spent, it is not in a mode which ends with the occasion, but in a mode which is beneficial and productive of profit during the whole life of the child.

I quite agree, that we are not to be so liberal in our construction of words of this description as to permit, under the guise of them, the application of funds given to one form of charity to another. Neither should we admit of charitable bodies denuding themselves of the duty of administering the whole of their funds, and transferring that duty and that obligation to the shoulders of some other persons or some other body of men. Again, in determining any

particular form of administration, as being one of the forms coming within the general scope and object of the charity, we must take care that the money applied to it is not so large as that that particular form of application shall trench unduly upon other forms of necessary application. Neither, if there has been an established mode of administration, giving rise to expectations and defining channels in which the funds of the charity have flowed for a considerable time, is that to be lightly departed from, and the money taken out of the channel of existing charitable distributions, in order to be applied to another and a different form of charitable distribution, although the latter equally with the former may come within the scope of the charity.

But now applying all those precautions and all those restrictions to the case before your Lordships, I apprehend, that your Lordships will agree with me, that the thing here proposed to be done is quite consistent with attention to every one of those cautionary rules. It appears, that this Guild of Wrights are in possession of a fund which, having regard to what the society is, I may denominate a considerable income. There appears to be no indication of the income having been otherwise than duly managed at the time when the gift was made. It appears to me, that they had a sum at their disposal, without the necessity of detracting from any one of the existing forms of charitable distribution and bounty which had been observed by them up to that particular time. I am not at all satisfied, that the application of this sum of £100 would, in the smallest degree, take away anything from any existing charitable object, or at all interfere with the power of the corporation to continue the charitable benefit, which up to that time they had dispensed out of their property.

In that state of things, therefore, having the power to apply a sum of £100 without injury, they were called upon by the city of Glasgow to contribute according to their proportion of benefit, to a very noble charity which had been founded in the city of Glasgow in this manner. A gentleman of the name of Buchanan had given a very large fund to be applied to the education of destitute children in Glasgow, but he accompanied that gift with the condition, that the City of Glasgow should find the requisite and appropriate buildings for the establishment of that charity. The city of Glasgow responded to that appeal by providing a considerable sum; but they have appealed to the different guilds of trades within the city to contribute also to this object. Now in contributing to the establishment of this charity, in the management and administration of which (as I find it stated) every one of the guilds will have a voice after the institution has been founded, the guild will be supporting an institution in which the sons of their decayed and poorer members will immediately have a direct benefit, all of them being admissible to the advantages of that educational institution. And the question then is simply this, whether a contribution to an educational charity of that description, embracing, as it were, not only destitute boys in Glasgow generally, but embracing also the sons of the poorer members of this society, be not an object coming directly within the general purpose which is here expressed, of the funds being applied to the support of the poor decayed brethren of this guild. That is a question to which common sense and good feeling will not hesitate to give an answer in the affirmative. When that question can be answered in the affirmative without violating any of the rules to which I have adverted as being necessary to be observed in order to keep each charity within its own channel, and not permit of its being entirely diverted into another channel, it is an answer which not only every Court of Justice is bound to give, but which it would be a very lamentable thing, having regard to the principles which regulate the administration of charity, if we were compelled upon any technical ground to refuse to give to the question raised by this appeal.

When, therefore, your Lordships are asked whether this appropriation is consistent with the purpose of this guild, I have no doubt, that you will answer the question, that, although you respect the motive which has led the appellant to exercise this caution and care over the administration of the charity, yet the result must be, that neither the charity nor the respondents must answer for his error in judgment, and his appeal must therefore, I submit to your Lordships, be dismissed with costs.

LORD CRANWORTH.—My Lords, it has not been suggested at the bar, that the directors of this charity who voted this £100 were actuated by anything but the purest motives—by anything but the desire of doing that which they thought best for the corporation, whose funds and interests were intrusted to them. Therefore, the case is reduced to the naked dry question, as stated by Mr. Anderson, Has the act which they did been an act *ultra vires* of the parties who did it? Now, that depends solely upon the question whether, what they have done has been a reasonable application of the £100 towards the support of the poor decayed brethren of the craft. Now can there be any doubt that it is so? If, instead of being so applied, it had been invested, it would, I will assume, have produced, at five per cent., one hundred shillings per annum, which, as there are ninety-eight—you may call them in round numbers one hundred recipients, as poor brethren—would have added one shilling in the year to the receipts of each. Now which is best for the corporation? That the recipients of the charity should each receive a shilling a year more than they now receive, or that there should be an establishment in the city of Glasgow, to which the sons of decayed members of the body may resort, and where they

may obtain a very excellent sort of education. Can anybody doubt which is the most advantageous? It was said, that there may be many decayed members who have no sons—many that have no children at all, and will not be benefited by it; but there is nothing which says, that the trustees in their discretion must benefit every decayed brother to the same extent: how they shall be benefited is left entirely to their discretion. A very fair test as to whether this would be *ultra vires* may be arrived at in this way. I do not suppose, that any member of this guild would really think, that it was not a very great benefit to them as inhabitants of the city, that the Buchanan charity should be established. Now, suppose Mr. Buchanan had said by his will, Provided always, that no poor decayed brethren of the Guild of Wrights shall receive any benefit from this charity unless that corporation subscribes £100 towards the endowment: can anybody doubt, that there would be no hesitation in saying, that it would be greatly to the advantage of the charity, that that should be done? But Mr. Buchanan could give no authority to the guild so to apply their funds. It must, therefore, be presumed, if you say it ought in that case to have been done, that there was inherent in the guild a power to do it.

My Lords, I shall not add anything more to what has been said by my noble and learned friend, the LORD CHANCELLOR. I regret with him, that this will fall very hardly on those who have raised this litigation, but it is one of the unfortunate instances too common in this House, in which we see parties from that part of the country north of the Tweed, incurring such enormous expenses of litigation for a very small object; and one cannot but deeply regret, that such cases should be so continually brought before us. I quite concur with my noble and learned friend, that this appeal must be dismissed with costs.

*Interlocutors affirmed, with costs.*

*Appellants' Agents*, T. Deans, Westminster; A. Morison, Edinburgh.—*Respondents' Agents*, Grahames and Wardlaw, Westminster; Hamilton and Kinnear, W.S., Edinburgh; W. Renison and Son, Glasgow.

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MARCH 9, 1865.

ANGUS MACKINTOSH, *Appellant*, v. JOHN SMITH and Others, *Respondents*.

Lunatic—Issue—Detention in a Madhouse—Illegal Detention—Evidence—Issue controlled by Record—Declarator of Sanity—*Res Judicata*—*In an action by M. for illegal and wrongful detention in a madhouse kept by S., an issue "whether M. was illegally and wrongfully detained" was settled.*

HELD (affirming judgment), *That such issue did not admit evidence as to alleged violations of the Statute in the mode of his treatment while in the madhouse.*

HELD FURTHER, *That a decree in an action of declarator of sanity raised by M. against S., and which decree passed in absence, was not admissible evidence to prove illegal detention.*

QUESTION, *How far an issue sent to trial is controlled by the record, so far as regards admissibility of evidence under such issue.*<sup>1</sup>

This was an appeal against interlocutors refusing a new trial.

The action was raised in May 1863, to recover damages from Dr. Smith and Dr. Lowe, keepers of the Saughton Hall Lunatic Asylum, for having wrongfully and illegally detained the appellant (the pursuer) in their private madhouse.<sup>2</sup>

The issue finally approved and sent to a jury was as follows:—"Whether the defenders, or either of them, and which of them, did illegally and wrongfully detain the pursuer in the private madhouse kept by them at Saughton Hall, in the parish of St Cuthbert's and county of Edinburgh, from the 13th June 1852 until the 21st July 1852, or during any part of said period, to the loss, injury, and damage of the pursuer? Damages laid at £5000."

The case was tried before Lord Kinloch and a jury on 5th February 1864; and on the 12th the jury, by a majority of nine to three, found for the defenders. During the proceedings, exceptions were taken by the pursuer's counsel. The first and fourth were directed against the refusal of the Judge to admit in evidence the extract decree in absence pronounced on the 19th December 1861, as well as the summons, proof, and interlocutor in the action of declarator of

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<sup>1</sup> See previous report, 2 Macph. 1261: 36 Sc. Jur. 189, 631. S. C. 4 Macq. Ap. 913: 3 Macph. H. L. 6: 37 Sc. Jur. 318.

<sup>2</sup> See a previous appeal between the same parties, *ante*, p. 1184.