

MAGISTRATES OF DUNDEE, . . . APPELLANTS.  
 PRESBYTERY OF DUNDEE, . . . RESPONDENTS (a).

1861.  
 June 18th, 21st,  
 24th, 25th, 27th.

- Charity Trust—Hospital—Ministers' Stipend.*—1. In the 14th century a hospital was founded at Dundee by James de Lyndsay, who granted it to the Trinity Friars, by the tenure of frankalmoigne. The grant was afterwards confirmed by Robert the 3rd, *ad sustentationem fratrum et infirmorum, senium, et ægrotantium ibidem.*
2. At the Reformation the hospital and property of the Trinity Friars came into the hands of the Town Corporation.
3. Subsequently to this acquisition, the Town Corporation received from Queen Mary a charter granting the revenues of the Grey Friars, of the Black Friars, of the Grey Sisters, and of all chaplaincies, altarages, and prebends within the burgh of Dundee. The general words of incorporation would seem to comprehend the property of all the former ecclesiastical bodies in the burgh; and from thenceforth the whole was conglomerated under the title of “the Hospital,” managed by “the Master;”—the grant of Queen Mary being regarded as an augmentation of the hospital property, with a new trust superadded.
4. The charter created a new trust in favour of the ministers of religion in Dundee, substituting for the Romish clergy the Presbyterian pastors.
5. The contemporaneous accounts and other evidence showed that annual payments had been regularly made by “the Master” to the ministers of religion in the burgh from the property of the old hospital, and from the property granted by the Queen, indiscriminately.

(a) This case is reported with extra copiousness in the Sec. Ser. of the Court of Session Cases, vol. 20, p. 849.

Held (agreeing with the Court of Session), that the providing of stipends for the ministers is one of the express trusts on which the town holds the trust property.

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Held (agreeing with the Court of Session), that purchases by means of the trust funds were, in the absence of any express declaration to the contrary, to be considered as augmentations of the trust property.

Held (agreeing with the Court of Session), that the old hospital was to be considered as affected by the same trusts as those under which Queen Mary's lands were held (a).

Held (disagreeing with the Court of Session), that certain property in the pleadings mentioned, called "Monorgan's croft" was given for the yearly maintenance of the aged and impotent people of Dundee, and, consequently, was not applicable to the support of the ministers aforesaid.

THE summons was raised by the Presbytery on the 19th November 1851, concluding as against the Magistrates as follows :—

That the funds and property held by the burgh of Dundee under a charter of Queen Mary dated 15th April 1567, and commonly known as the "Hospital Fund," were applicable to the sustentation of the ministers of the Word of God, and the support and maintenance of the clergy of the Established Church of Scotland within the burgh of Dundee; and that it ought to be declared that the Magistrates, as holders and administrators of the said fund, were bound out of the revenues thence arising to provide suitable and adequate stipends to the ministers of the Established Church within the said burgh, other than the rector or first minister thereof who was otherwise provided for.

What is called the Hospital Fund of Dundee, though administered by the Magistrates, is distinct from the ordinary burghal property. The hospital

(a) Lord Chelmsford, after a most elaborate examination of the evidence, dissented from certain parts of the reasoning on which the majority of the Law Peers (Lords Brougham and Cranworth) proceeded. His Lordship, however, said that "the practical result of adopting his view would have but a small bearing upon the rights which had been established by the ministers of Dundee."

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fund yields a revenue of about 1,800*l.* a year, arising from rents, feu duties, ground annuals, and interests of money.

The Magistrates resisted the demand of the Presbytery.

The Second Division of the Court of Session made a remit to Mr. Cosmo Innes, Advocate, “to examine  
“ the documents and books in process ; to receive any  
“ written statements or explanations by the parties ;  
“ and to hear them thereon, and thereafter to report,  
“ 1st, what properties or funds were conveyed to  
“ the Magistrates by Queen Mary’s grant ; 2ndly,  
“ what properties and funds at present belong to the  
“ hospital ; 3rdly, the amount of the past and present  
“ revenue under Queen Mary’s grant, and of the funds  
“ and properties known as the hospital fund ; and  
“ the amount of the past and present stipends paid  
“ to the clergy by the Town Council.” &c.

Mr. Innes having made his report, the Second Division of the Court of Session on the 18th July 1856 pronounced the following Interlocutor, which goes into the whole merits of the case :—

The Lords, having heard parties’ procurators, and advised the cause, with the report of Mr. Innes, find that the objection stated in the first plea in law for the Defenders, viz.—that the Pursuers have not a sufficient title to pursue the present action, was not insisted in at the last debate before the Court, and is in itself groundless ; therefore repel the same. Find that it was distinctly admitted at the bar that a grant by royal charter was made by Queen Mary in favour of the town of Dundee of the date libelled, and in terms set forth on record ; and further, find that the execution and tenor of that grant are sufficiently instructed by competent and legal evidence.

Find that by that charter a trust was validly and effectually constituted in the town of Dundee and its administrators, in order to execute the purposes of the grant.

Find that this grant was confirmed, and ratified, and enlarged on different occasions, by royal charters.

Find that this trust has never been altered or modified by any subsequent royal grant, or by any competent authority.

Find that the objects of the grant are set forth in the said charter by Her Majesty Queen Mary in the following terms:—“ Quia nos impensius munus nostrum erga divinum servitium perpendentes, ac pro ardenti zelo quem ob intertenendam politiam et æquam ordinem inter subditos nostros, precipue vero infra burgum nostrum de Dundee, præservandum habemus; considerantes itaque nos ex officii tenore munus erga Deum complecti debere, cujus providentia regimini hujus regni præponimur; sicque nobis ex officio incumbere omni honesto modo pro ministris verbi Dei providere; et quod hospitalia pauperibus mutilatis et miseris personis, orphanis, et parentibus destitutis infantibus infra dictum nostrum burgum præserventur; post nostram perfectam ætatem, cum avisamento secreti consilii nostri, ORDINAMUS, CONCEDIMUS, DISPONIMUS, ac pro nobis et successoribus nostris, pro perpetuo CONFIRMAMUS, prædilectis nostris præposito, ballivis, consulibus, et communitati dicti nostri burgi de Dundee ac ipsorum successoribus in perpetuum, omnes et singulas terras, tenementa, domus, ædificia, ecclesias, capellas, hortos, pomeria, toftas, croftas, annuos redditus, fructus, divorias, proficua, emolumenta, lie *dele silver*, obitus, anniversaria quæcunque [quæ] quovismodo pertinuerunt aut pertinere dinoscuntur ad quascunque capellanas, altaragia, prebendarias in quacunque ecclesia, capella, aut collegio infra libertatem dicti nostri burgi de Dundee fundata seu fundatas, per quemcunque patronum in quarum possessione capellani et prebendarii earundem fuerunt, ubicunque præfatæ domus, tenementa, ædificia, pomeria, horti, annui redditus, anniversaria, fructus, proventus, et emolumenta jacent aut prius levata fuerunt respective cum manerierum [locis] pomeriis, terris, annuis redditibus, emolumentis, divoriis quibuscunque [quæ] Fratribus Dominicalibus seu Prædicatoribus, Minoribus seu Franciscanis et Monialibus, vulgo *gray sisteris* dicti nostri burgi de Dundee perprieus pertinuerunt; unacum omnibus et singulis terris, domibus, tenementisque jacentibus infra dictum nostrum burgum ac libertatem ejusdem cum omnibus annuis redditibus de quacunque domo, terris, aut tenemento infra dictum nostrum burgum levandis, datis, donatis, et fundatis quibuscunque capellaniis, altaragiis, ecclesiis, mortuariis, aut anniversariis ubicunque sint infra regnum nostrum: Ac etiam cum omnibus et singulis annuis redditibus et aliis divoriis solitis, aut quæ per quamcunque ecclesiam extra dictum nostrum burgum a præposito et ballivis ejusdem de communi redditu ejusdem pro suffragiis celebrandis demandari poterint, cum pertinentiis. Ac etiam cum avisamento præscripto, UNIMUS et INCORPORAMUS omnes et singulas terras, tenementa, domus, ædificia, ecclesias, cimiteria, capellas, pomeria, hortos, croftas, annuos redditus, fructus, divorias, proficua, emolumenta, firmas, obitus, anniversaria, Fratrum et [Monialium] loca, hortos eorundem, cum suis pertinentiis, in unum corpus in posterum appellandum FUNDATIO NOSTRA MINISTERII ET HOSPITALITATIS de Dundee.” And,

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Find that to this foundation an important addition was made by the charter issued by King James VI., on 16th January 1601, granting the whole vicarage property for the purposes of the foundation in the following terms:—"Igitur ex certa nostra scientia et motu proprio, pro sustentatione Ministrorum Evangelii et custodia Hospitalitatis pauperibus et miseris personis infra dictum burgum, dedimus, concessimus, et disposuimus, tenore presentis carte nostre damus, concedimus, et disponimus predictis preposito, ballivis, consulibus, et communitati prefati burgi de Dundie, et eorum successoribus imperpetuum, totam et integram prefatam vicariam ecclesie et parochie de Dundie, cum omnibus et singulis decimis, fructibus, redditibus, proficuis, et emolumentis quibuscunque ad dictam vicariam pertinentibus, intromittendam, levandam, et recipiendam, per prefatos prepositum, ballivos, consules, communitatem, et eorum successores, suosque factores et camerarios, de croppa et anno Domini millesimo et sexcentesimo; et similiter, annuatim et terminatim omnibus temporibus futuris, et applicandam pro sustentatione ministrorum curam dicti burgi de Dundie gerentium, et intertenimento pauperum infra Hospitalitatem ejusdem residentium."

Find that no relevant facts have been averred sufficient to support the third plea in law stated by the Defenders.

Find that no facts have been averred sufficient to support the fourth plea in law, if stated to the extent of excluding any power on the part of the Court to enforce the conditions of the trust.

Find that in the circumstances stated and proved as to the stipends previously paid to the ministers of Dundee, other than the first minister, who is provided for out of the teinds, and as to the stipends now paid to them, a case has been put on record sufficient to warrant the interference of the Court, if the ministers of Dundee have a claim which can be enforced in a Court of law against funds belonging to the foundation.

Find that according to the sound construction of the said grant the funds and property held and enjoyed by the burgh of Dundee under and in virtue of the charter granted by Queen Mary, bearing date 15th April 1567, and subsequent charters and acts of ratification confirming the same, now commonly known as the Hospital Fund, are, by the terms of the trust so created, to be applied to the sustentation of the ministry of the Word of God, and the support and maintenance of the clergy of the Established Church of Scotland within the burgh of Dundee.

Find that until the amount of the funds belonging to the foundation is ascertained, it would be premature to decide whether the ministers of Dundee (other than the first minister) have a preferable claim on the same to the extent of obtaining suitable stipends therefrom, but with this explanation.

Find that the funds of the foundation are to be applied in providing adequate stipends to the said ministers, so far as not

otherwise provided for them ; and that the Defenders, in the due execution of the trust committed to them, are under obligation to apply the same accordingly, in so far as the same are not exhausted, as is averred, by the payments already made to such ministers, or in so far as it can be made out that the same are not exhausted by other and legal application to another purpose of the trust,—reserving for after consideration any questions which may be raised as to the special conditions on which the cures of any of these ministers may have been created, or the limitations, if any, of the claims of the ministers serving the same, or any of them, to stipend out of particular funds as their only source of payment. And in regard to the defence stated in the fifth plea in law for the Defenders, viz. :—That “ the ministers of Dundee being now in receipt from the hospital of sums which exhaust the revenue derived under the charter founded on by the Pursuers, as far as known or traceable, have no *farther claim* on the hospital funds,” before farther answer, renew the remit to Mr. Cosmo Innes, that he may make a further report on all the points mentioned in the former remit to him, with full powers to prosecute the inquiries pointed at in his former report, which, for the reasons therein stated, he did not follow out ; and also to call for and examine into the titles to, and acquisition of the lands mentioned in his former remit, to which the town appears to have no title ; and also of any other lands which, in the course of the inquiry, he may have reason to think have been acquired under the authority of the grant of Queen Mary and subsequent charters ; and further, with the aid of an accountant as after mentioned, to examine the whole accounts of the hospital and of the burgh funds, in order to ascertain and trace the accumulations of the hospital funds, and payments or purchases made out of the same, with reference to the inquiries directed by this and the former remit ; and further, to inquire into and report to what purposes the surplus funds, if any, were employed, before the general large increase in particular years to those who are denominated paupers, or receive aid as such, as exhibited in the table given by Mr. Innes at p. 18 of his report, and in subsequent years, if any such increase took place, so as to show how the managers were able to make such large additions to such payments in the years 1818, and in particular years thereafter, and what funds remained in the hands of the hospital master thereafter, and to what purposes the same were applied : and whether, at any period, any sums were paid out of the funds of the foundation to the Town Council of Dundee, or towards any burghal object, and whether such payments, if any, have been repaid : and further, to exhibit separately the rental which he may come to be satisfied is the proper annual income derived from properties acquired under the grant or purchased in the administration of the foundation, and also in a separate column, the income from properties left generally to the hospital in any sub-

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sequent grants, and especially the income from properties left specially for the poor, without any notice of the hospital, so as to show what funds are specially applicable to the maintenance of the poor separate from the funds and income of the foundation proper, in so far as the two can be satisfactorily distinguished: Further, to inquire into and satisfy himself, so far as is necessary, as to the circumstances and conditions of the persons now receiving aid from the hospital, calling for the lists of such persons, and to report how many receive relief, and of such, how many fall within the description of the poor contained in the royal grants, and how and in what manner they are put on the roll of pensioners, whether by minute of council, or in what other manner: and whether any, or what portion of the funds have been paid to the parochial board or their predecessors for the ordinary poor of the burgh; and further, to inquire into and report to what other purposes, if any, the funds of the hospital are applied, and what is the annual expense of management of the hospital, and how the same is charged; whether generally against the whole funds as massed together; and specially to report what annual expense is stated for or would be applicable to the property called Monorgan's croft; and further, to inquire into and report on any matters stated by the parties to him, as important in their opinion, and which he may consider as material; and in order to complete and bring out the investigations now and previously directed, remit to Mr. George A. Jamieson, to act as accountant under and in aid of Mr. Innes, and to make a full examination of all accounts, minutes, and other documents, in order to exhaust the whole matters specified in this and the former remit. Of new, grant commission to Mr. Innes, and diligence against havers, in terms of the former remit; and with general authority to Mr. Innes and the accountant to inquire and report in terms of the concluding part of the former remit. Further, find the Pursuers entitled to one-half of the taxed amount of the expenses of the discussions before the Lord Ordinary and in the Inner House, after the date of closing the record, up to this date,—reserving all other questions of expenses.

Under the remit contained in this Interlocutor Mr. Innes made a second report, and Mr. Jamieson an interim report. To these the Appellants lodged objections, which the Respondents answered; and the cause coming again before the Second Division, that Court, on the 18th March 1858, pronounced the following Interlocutor:—

The Lords having heard parties' procurators at great length on the interim reports by Mr. Innes, and that of the accountant

acting along with him ; and no further evidence being offered on either side, Find that the claim of the ministers of Dundee (other than the first minister) to have suitable and adequate stipends provided for them out of the funds and estate of the foundation, already sustained by the Interlocutor of 18th July 1856, is one of the primary claims on the foundation, and that no application of the said funds and estate has been condescended on by the Defenders which can be allowed to encroach on the same, to the effect of diminishing the annual proceeds of the same, in competition with the said claim for suitable and adequate stipends, hereby declared to be a primary purpose of the foundation.

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(2.) Find that the purchases and investments made by the hospital managers in the course of the period which has elapsed since the date of Queen Mary's grant have been consolidated with the original estate of the foundation, under the terms of the trust thereby created, and form part of the common estate belonging to the same, applicable to the purposes of the foundation.

(3.) Find that property or funds bequeathed or mortified to "the hospital" generally, or to the hospital and eleemosynary of Dundee, and without any special limitation of purpose, belong to and form part of the estate of the foundation, and are applicable generally to the purposes of the same.

(4.) Find that the Defenders have referred to no separate title to the old hospital and its property, and have not been able to show in what way, or when, they acquired any right to the same ; and that the management of the same having been assumed by the Town Council after the abolition of the Papal establishment, which had previously administered it, the same fell within the scope of the general terms of Queen Mary's grant, and became part thereof, and has been so administered and managed since 1567.

(5.) Find that the ground called Monorgan's croft was purchased out of the accumulations and savings of the general funds of the hospital, and belongs to the foundation.

But find that the hospital at different times received the whole legacy left by Robert Johnston of London, amounting to 1,000*l* sterling, to be employed by the Provost and Bailies of Dundee in the "yearly maintenance of the aged and impotent people" of the said town, and that the annual interest of 1,000*l*. must be held applicable to that purpose in framing a final state of accounts ; and that, as to past administration, as the interest of that sum was to be strictly so appropriated, it must be held that it was fully accounted for by the charities to which the funds generally of the foundation were applied.

(6.) Find that the ground called the Howff belonged to and fell under the foundation trust, and direct the accountant to

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exhibit what difference in the final account the repayment of the sum employed out of the hospital funds to obtain a new cemetery would ultimately make.

(7.) Find that any sums which may be shown to have been received under the will of Sir T. Moodie, or of the Reverend James Paton, and which hitherto have been applied indiscriminately along with the general funds of the foundation, are to be taken in the future administration to be debts due by the hospital, the interest of which is to be accounted for and applied to the objects of the said bequests,—the interest for the past having been fully accounted for in the relief of the poor: and further, find that in regard to such funds held by the hospital specially for the poor they are to be taken to relieve *pro tanto* the general funds of the foundation, to the effect of thereby leaving an ampler income for the fulfilment of the other purpose of the trust.

(8.) Find that the views taken by Mr. Jamieson, in framing the accounts for the period to which his report specially applies, are correct, so far as relates to the savings and accumulations from the hospital funds, and to the charges applicable to capital and revenue, and to the results stated by the accountant: Repel the whole objections stated by the Defenders in their note of objections to the accountant's report, and approve of the said report: Of new, remit to Mr. Innes and the accountant to complete a final report, in terms of the remit contained in the Interlocutor of 18th July 1856, and of the foregoing findings, so that the Court may have an adjusted account of the whole income of the foundation applicable to the purposes of the trust, and exhibit the funds out of which the obligations imposed on the Defenders by the original trust, and embodied in the findings of the Court, may be discharged.

Find the Pursuers entitled to the whole expenses incurred by them since the closing of the record, and allow an account to be given in, and remit the same to be now taxed by the auditor, that interim decree may issue for the same.

Find the Defenders in the first instance liable in two-thirds of the accountant's fee, and of the fee to Mr. Innes, which the Lords fix at 400 guineas, and decern *ad interim*, and reserve all other questions of expenses.

Against these Interlocutors, the Magistrates appealed to the House; and the case came on for hearing on the 18th June 1861, Lord Chancellor *Campbell* occupying the woolsack. It was continued till Friday, the 21st, his Lordship still presiding. It was adjourned till Monday, the 24th. On Sunday, the 23rd, the

Lord Chancellor died. The subsequent argument on the 25th and 27th June was before Lord *Brougham*, Lord *Cranworth*, and Lord *Chelmsford*.

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The *Attorney-General* (a) and Mr. *Roundell Palmer* were of Counsel for the Magistrates.

Mr. *Rolt* and Sir *Hugh Cairns* for the Presbytery.

The following opinions were delivered by the Law Peers.

Lord CRANWORTH :

*Lord Cranworth's  
opinion.*

My Lords, the ground on which the Appellants complain of the first Interlocutor is, that it puts a wrong construction on Queen Mary's charter, that it treats that instrument as having created a valid trust in favour of the ministers of Dundee, whereas no such trust was created. But I am clearly of opinion that a trust in favour of the ministers was created.

The charter has been so often stated at length in the course of the argument at the bar that I do not think it necessary to repeat its contents. It is enough to say the grant of the ecclesiastical property, which it makes to the town, is prefaced by a recital stating as the motive for the grant that the Queen, to whom the rule of the kingdom by God's providence had been entrusted, was bound by her duty towards God to provide by all honest means for the ministers of His Word, and to keep up hospitals for the poor, the maimed, and the destitute, and, therefore, She, with the advice of Her Privy Council, granted to the Provost, Bailies, and Council of Dundee the ecclesiastical property therein described, and which had formerly belonged to certain ecclesiastical establishments in the town. Now unless this recital of the motive for the grant be understood as intended to impose on the grantees the duty of applying the property granted in

(a) Sir Richard Bethell.

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such a mode as shall discharge the obligations of the Queen making the grant, the recital would have been useless. It is plain that the intention was to make the grant in order that thereby a very solemn duty imposed on the grantees might be fulfilled.

This would, I think, have been the reasonable interpretation of the charter, even if we had to construe it unassisted by the light afforded by contemporary history. But when we recollect what was happening at the time when the charter was made, its intention is even made more manifest. In consequence of the then recent changes in the religion of the country large masses of ecclesiastical property had been violently torn from the former possessors. That property had theretofore afforded support to the ministers of the old religion, and had largely contributed to the relief of the necessitous. Nothing, therefore, could be more probable than that portions of it should be from time to time appropriated by the Crown for the purpose of supplying, in particular places, the want which its confiscation must have occasioned to those to whose support it had previously contributed. What we should expect in any grant by the Crown of such property would be, that it should be devoted to the ministers of the reformed religion and to the poor; and this *à priori* probability as to what would be the destination of the property granted may well help us in understanding the terms of the grant, if doubtful—not that I consider any such help in this case to be necessary. I concur with the Court of Session in thinking it clear beyond all reasonable doubt, that this charter of Queen Mary created a trust in the authorities of the town in favour of these classes, which had formerly been practically in the enjoyment of the property granted; namely, the poor and the ministers of religion,—as to the latter,

however, substituting for the Romish clergy the ministers of the reformed religion.

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These considerations are sufficient to dispose of all questions arising on the first Interlocutor. The views of the Court below are satisfactorily summed up in that part of the Interlocutor which precedes the renewal of the remit to Mr. Innes, and in which the Court “ finds that the funds of the foundation are to “ be applied in providing adequate stipends to the “ said ministers, so far as not otherwise provided for “ them ; and that the Defenders, in the due execution “ of the trust committed to them, are under obligation “ to apply the same accordingly, in so far as the same “ are not exhausted, as is averred, by the payments “ already made to such ministers, or in so far as it “ can be made out that the same are not exhausted “ by other and legal application to another purpose “ of the trust.” This finding appears to me properly to explain the trust on which the authorities of the borough hold the property included in or governed by the trusts of the charter ; and I can, therefore, discover no ground whatever for quarrelling with the first Interlocutor.

The object of the second Interlocutor was to declare of what particulars the property subject to the trusts of the charter consists, and the objections of the Appellants are, that supposing valid trusts to have been created by the charter in favour of the ministers of religion and of the poor, still much of the property now held by the town in union with that which it derived from Queen Mary's charter, is held under different titles, and is not subject to Queen Mary's trusts.

And first, and principally, as to the old hospital and its property. The Appellants contend that they hold this by a right prior to the date of the charter,

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and independent of it, and so that it is unaffected by Queen Mary's trusts.

The hospital is shown by the evidence to have been founded in the fourteenth century by James de Lyndsay, who granted it to the friars of the Holy Trinity, in Dundee, commonly called the Red Friars *in hospitale et domum Dei*, by the tenure of frankalmoigne. That grant was afterwards confirmed by King Robert the Third, to hold the said tenement to the said friars in frankalmoigne *ad sustentationem dictorum fratrum et infirmorum, senium, et ægrolantium ibidem*.

There is no evidence relating to the hospital from the time of its foundation down to the year 1544; but in that year, and in the beginning of 1545, there is proof that three small annual rents were granted to Robert Mylne the elder, described as a burghess of the borough and master of the hospital, and to his successors masters of the said hospital. It is further shown, that in 1554 an annual rent of one mark was granted in the presence of William Carmichael, master of the almshouse, to the said almshouse in perpetuity; and on the 25th of July 1563 a grant of an annual rent of five pounds was made to Thomas Ogilvie, described as master of the hospital or almshouse of the said burgh, for the use of the poor of the said house and their successors.

From this evidence it is impossible not to infer that the hospital or domus Dei, though originally granted to the friars of the Holy Trinity, had come to be administered by a secular authority. How this happened does not appear, but on no other hypothesis can I explain the fact that there was a regular officer, plainly not one of the friars of the Holy Trinity, acting as master of the hospital, and apparently enjoying a corporate character. Probably, as I have

already suggested, the town had in the confusion incident to the earliest religious disturbances seized the property, and endeavoured to appropriate it to themselves, or they may have taken possession of it under the royal authority I shall now refer to.

Among the papers before us is an Order of Council made on the 15th February 1561. The Queen, by advice of Her Council, thereby ordered that all annual rents and duties within free boroughs, pertaining as well to chapelries and prebendaries as to friars, together with the rents of friars' lands where-soever situate, should be collected by such persons as Her Grace should depute thereto, for employing the same by Her Highness to hospitals, schools, and other godly uses. And knowing that nothing was more commodious for the said hospitals than the places (*i.e.*, the buildings) of friars yet standing undemolished, She ordained the Provost and Bailiffs of the boroughs of the realm to uphold the said friars' places out of the common good (*i.e.*, revenues of the said towns) until the Queen's Majesty should be further advised, and should take final order therein, notwithstanding any other gift of the said places theretofore made by the Queen to any person whomsoever.

We find from the minutes of meetings of the Magistrates and Town Council of Dundee, that on the 19th of October 1563, being less than two years after the date of the above-mentioned Order of Council, the authorities of the town appointed the almshouse masters, and that apparently as if they were not so acting then for the first time. The great probability, therefore, is, that the municipal authorities of Dundee took possession of the hospital in that town, and the property attached to it, either by virtue of that Order in Council or in anticipation of it.

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The next document of importance is an Order of Council of the 10th of January 1566-7, whereby commissioners were appointed for the purpose of taxing the boroughs of the realm with the payment of annual sums for the support of the ministers of religion. The order proceeds to say, that for relief of the said boroughs, the Queen, by advice of Her Council, granted to the boroughs the annual rents of altarages, chapelries, and obits within the same, not already disposed to others, for the purpose of thereby relieving the taxation to be made by the commissioners; and the surplus of such rents, if any, to be distributed to the poor and the hospitals of every borough within themselves, by advice of the ministers and elders thereof.

The conclusion, as matter of fact, to be deduced from all these documents appears to me to be, that at the date of Queen Mary's charter in April 1567 the municipal authorities of Dundee had, either under the Orders of Council to which I have referred, or by some earlier or other title now incapable of explanation, obtained possession of the whole of the property formerly of the Trinity Friars, including the hospital, and that they were administering its funds for the general purposes of an hospital for relief of aged and sick poor.

In this state of things Queen Mary, by Her Charter dated the 15th of April 1567, granted to the town the revenues of the Grey Friars, the Black Friars, and the Grey Sisters, and of all chaplaincies, altarages, and prebends within the borough.

It was strongly urged by the Appellants that there are no words in this grant which would include the hospital granted by Sir James Lyndsay to the friars of the Holy Trinity, nor indeed any of the possessions of that body, and I think they are right in that con-

tention. But the reason why this property was not included in the grant appears to me to have been, that by some means or other now incapable of explanation the town was already in possession of it, and in possession of it in a corporate character by the description of the hospital or almshouse of Dundee. This will fully explain the subsequent part of the charter, whereby the Queen unites and incorporates the property into one body, to be called in future Our foundation of the ministry and hospital or hospitality of Dundee. It was said that the property thus united and incorporated does not include anything not included in the grant. I am by no means sure that it does not. The town was already in possession of the property of the friars of the Holy Trinity, including the hospital. The language of the incorporation is not in terms by reference confined to the property granted by the previous part of the charter, and as the immediate subsequent usage shows that it must have been intended to administer the whole as one property, I am by no means satisfied that the general words of the incorporation might not have been intended to comprehend the property of all the former ecclesiastical bodies in the borough, as well that already possessed by the town as that included in the grant. It is not impossible that this union and incorporation may have been desired by the town, in order thereby to make good some defect in the earlier title to what they held. But if that is not so, still the evidence satisfies me that from the time of the grant the town treated the whole as one common property, to be all administered as one trust fund, all designated as *the Hospital*. It is certain that this has been the principle on which the revenues have been disposed of since 1581. All the revenue has been treated as belonging to the hospital. The language of the

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charge or rental of 1581 is, “the charge or rental of  
“the master of the hospital of Dundee, containing the  
“rents, &c. which pertained of old to the hospital,  
“as also of the Grey Friars, &c., now doted to the  
“said hospital by our Sovereign Lord and his pro-  
“genitors, &c.” From this it appears that the master  
of the hospital was the person who was to administer  
the whole, and the grant of Queen Mary was treated  
merely as a further endowment of the hospital with  
further trusts attached to it.

In conformity with this view of the case we find  
that as early as any records go back after the date of  
the charter annual payments were regularly made by  
the master of the hospital to the ministers of religion  
in the borough out of the sums coming to his hands  
from both sources, *i.e.*, from the old property of the  
hospital and from that granted by Queen Mary, no  
distinction whatever being made in the accounts as to  
which property supplied the funds. I observe, also,  
that in 1588 certain title deeds, which had been put  
into the hands of a professional man, in reference to a  
lawsuit in which the town had been involved, were  
all restored by him to the master of the hospital, he  
being, I suppose, the proper custos, and these deeds  
clearly related, some to the old property of the hos-  
pital, and some to that added by Queen Mary. This  
furnishes an additional proof that the property de-  
scribed as the hospital was all administered as one  
trust fund, under the management of a functionary  
designated the master of the hospital, or sometimes of  
the almshouse.

Finding, then, that ever since the date of Queen  
Mary's charter, a period now of nearly three centuries,  
the old hospital property and that granted by the  
charter have always been treated as constituting one  
trust estate, administered by the town through one

functionary, and applied on trusts corresponding or intended to correspond with Queen Mary's trusts, I think the inference reasonable, that from the date of the charter it was always intended to deal with the whole as if it had all been derived from the same source. I may add that out of the savings from the common funds, *i.e.* from the rents as well of the hospital properly so called as of the lands granted by Queen Mary, many investments were from time to time made for the benefit of the hospital, and many gifts or bequests have been from time to time made to the hospital, in neither case specifying the nature of the trusts. This seems to me to be inconsistent with the hypothesis that the funds of the hospital, including those derived from Queen Mary's charter, were not all applicable to a common purpose.

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Having come to this conclusion, I am prepared to say, that I think the second Interlocutor is right so far as relates to the first four heads or divisions of it.

The first head, though not, I think, happily worded, means no more than that the providing of stipends for the ministers is one of the express trusts on which the town holds the trust property. It is in fact only what had been declared in the first Interlocutor.

The second and third heads are introduced to guide those who are afterwards to administer the funds, by pointing out what is clearly right, namely, that purchases made generally by the corporation out of their savings or general trust property are, in the absence of any express declaration to the contrary, to be considered as mere additions to the corporate property, subject to all the trusts affecting it.

Then comes the fourth head, which in substance declares, and, as I have explained, in my opinion correctly declares, that the hospital is to be considered as

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affected by the same trusts as those under which Queen Mary's lands are held.

This brings us to the fifth head of the Interlocutor, that relating to Monorgon's croft. On this head I am unable to concur with the Court of Session. The facts of the case are tolerably clear. Robert Johnston, by his will dated the 30th of September 1639, gave to the Provost and Bailiffs of Dundee the sum of 1,000*l.* sterling, to be employed in a stock or wadsett of land in perpetuity for the yearly maintenance of the aged and impotent people of the said town of Dundee. Johnston must have died before July 1642, for by a minute in the books of the Town Council of Dundee, dated the 12th of July 1642, we find that the Council then ordered that the sum of 1,000*l.*, or so much of it as should be obtained, should be waired and employed on land or otherwise where best commodities might be had, the annual rent thereof to be totally employed for the maintenance of the poor decayed neighbours within the borough.

By several subsequent minutes in that same year it appears that the sum of 750*l.*, part of the 1,000*l.*, was received by the town before the 15th of November 1642, for on that day the town gave a heritable bond for that sum to the master of the hospital. The bond was for 13,500 marks Scotch, being equivalent to 9,000*l.* Scotch or 750*l.* sterling.

The balance of the legacy, being 3,000*l.* Scotch, was not paid till the year 1646, but by a Minute of Council dated 2nd June 1646, we find that this balance had then come to the hands of Alexander Wedderburne, their clerk, and it was disposed of by their direction as follows: 2,500 marks, part thereof, was retained by Wedderburne as the purchase money for Monorgon's croft, which was disposed by him to the hospital, and the rest (*i.e.*, 2,000 marks) was paid over to

William Duncan, the master of the hospital, to be employed for behoof thereof.

The correctness of these minutes is fully confirmed by the books of the hospital. Those books contain, amongst other things, the accounts of William Duncan, the master of the hospital in the years 1645, 1646, and 1647. He charges himself with the receipt from his predecessor of the bond given by the town for 9,000*l.* Scotch, and also with having received, in June 1646, 3,000*l.* Scotch, equal to 4,500 marks, from Johnstone's executors as the balance of his legacy. He takes credit, on the other hand, for a sum of 1,666*l.* 13*s.* 4*d.* Scotch, equal to 2,500 marks, as paid in June 1646 to Wedderburne for Monorgon's croft; and it appears that at Lammas (1st August) 1646 he lent to Thomas Scot on his bond a sum of 1,333*l.* 6*s.* 8*d.* Scotch, equal to 2,000 marks, being probably the remainder of the 3,000*l.* which he had received in June as the balance of Johnstone's legacy. There is no doubt, therefore, that a sum of 2,500 marks Scotch, part of this legacy, was in fact applied in the purchase of Monorgon's croft, but the Court below considered that though the payment to Wedderburne was made out of the money received by him as the balance of Johnstone's legacy, yet the purchase must be considered as having been made by the hospital out of their general funds, and that the fact of the payment having been made out of the money which had been previously received by Wedderburne on account of the legacy was merely an arrangement by way of convenience, not indicating any intention of treating the purchase of Monorgon's croft as an investment of a part of the legacy. It is remarked by the *Lord Justice-Clerk* that Johnstone's will did not authorize an investment in land, and our attention was directed to

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a Minute of Council dated on the 18th of March 1645, being above two months before the appropriation by Wedderburne of his purchase money, by which Minute it appears that the Council had contracted with him for the purchase before (so far as appears) any part of the legacy had come to his hands.

With regard to the observation that the will did not authorize the investment in land, it is very true that it did not, unless land can be deemed to come under the term stock, which can hardly be contended. But what we are to consider is, not whether if this investment had been questioned, those who made it could have justified what they had done, but whether it was not in fact intended to be an investment of a part of the legacy. I cannot doubt that it was so intended. The Council clearly thought they might invest on land, for by their Minute of the 12th of July 1642, to which I have already referred, they expressly order that the legacy when received shall be waired and employed upon land or otherwise. They contracted with Wedderburne, their clerk, for the purchase of this close expressly for the hospital a few weeks before he had received the money, but when in all probability they knew that it would speedily be forthcoming; and the master of the hospital debiting himself with the whole balance which came to Wedderburne's hands, takes credit for the purchase money of the croft as for so much money paid to him. I think it therefore impossible not to consider that a part of Johnstone's legacy was invested in the purchase of Monorgon's croft, and so that in that respect the second Interlocutor ought to be varied.

This disposes of the whole question, for as to the sixth head relating to the Howff, there can be no dis-

pute. It was part of the property conveyed by Queen Mary's charter, though subject to a servitude not disputed, *i.e.*, a right of the inhabitants to bury their dead there.

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The seventh head merely declares in substance that certain bequests made for specific objects are to be applied according to the trusts declared in relation to them, and that in the application of the funds according to Queen Mary's trusts for the benefit of the ministers and the poor, those who are to administer the trusts may take into account in the exercise of their discretion any funds expressly applicable to one of these charitable objects.

The rest of the Interlocutor merely relates to the accounts to be taken with a view to an ultimate decision, and this was not objected to. My advice to your Lordships, therefore, is to affirm the Interlocutors appealed from except as to the fourth head of the second Interlocutor, and as to that to remit the case back with a declaration that Monorgon's croft is to be held on the trusts declared by Johnstone's will as to the legacy of 1,000*l.* thereby bequeathed.

My Lords, I have the authority of my noble and learned friend, Lord *Brougham*, who is not able to be present this morning, to say that he concurs in this view of the case. I believe that my noble and learned friend opposite does not quite agree with respect to the hospital. Under these circumstances my noble and learned friend, Lord *Brougham*, being absent, probably would not be counted in a division of opinion; but, inasmuch as there is the judgment of the Court below, and the rule is that where your Lordships are equally divided the judgment is *pro negante*, the result is the same as if Lord *Brougham* had been present, namely, that the judgment of the Court of

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Session will be affirmed as to both points, and that the cause will be remitted with a declaration. I think that the Appeal ought to be dismissed with costs so far as relates to the first Interlocutor. As to the fourth head of the second Interlocutor, to remit the case with a declaration.

Lord WENSLEYDALE :

My Lords, as I heard only part of the argument in this case, I shall decline to give any opinion upon it.

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Lord CHELMSFORD :

My Lord, I am unable to agree with the learned Judges of the Court of Session, and with my noble and learned friends, in the construction which they have put upon Queen Mary's charter. It is impossible for me to feel any great confidence in my opinion which stands alone, in opposition to the conclusions of so many who are entitled to the greatest deference. But I have the satisfaction to think that the practical result of adopting my view would have but a small bearing upon the rights which we both agree have been established by the ministers of Dundee. In considering the case it will be unnecessary to refer to more than a small part of the two Interlocutors appealed from. In the first Interlocutor the Court of Session find that according to the sound construction of the said grant the funds and property held and enjoyed by the burgh of Dundee under and in virtue of the charter granted by Queen Mary, bearing date the 15th April 1567, and subsequent charters and acts of ratification confirming the same, now commonly known as the Hospital Fund, are by the terms of the trust so created to be applied to the sustentation of the ministry of the Word of

God, and the support and maintenance of the clergy of the Established Church of Scotland within the burgh of Dundee. With this finding (subject to a remark on the ambiguity of the expression “now commonly known as the Hospital Fund”) I entirely agree. In the second Interlocutor they find, “that the Defenders have referred to no separate title to the old hospital and its property, and have not been able to show in what way or when they acquired any right to the same, and that the management of the same having been assumed by the Town Council after the abolition of the papal establishment, which had previously administered it, the same fell within the scope of the general terms of Queen Mary’s grant, and became part thereof, and has been so administered and managed since 1567.” I differ with this Interlocutor upon the question of fact as to the management of the old hospital having been assumed by the Town Council after the abolition of the papal establishment, and in the conclusion drawn from the fact thus found, that its property “fell within the scope of the general terms of Queen Mary’s grant.” Upon the subject of the acquisition of the hospital property, the *Lord Justice-Clerk* adopts the suggestion contained in Mr. Innes’s report, that “the property was appropriated probably by the town when the Roman Catholic bodies were *de facto* dissolved, and that the general grant of Queen Mary became the title for retaining it.” Mr. Innes, in that portion of his report which is thus referred to by the *Lord Justice-Clerk*, says, “Without reference to the Statute Book, we know that the convents of all the regular religious orders, and more especially friars, were broken up and scattered about the year 1559-60.” And after adverting to the Act of Secret Council of 15th February 1561 (which will be pre-

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sently mentioned), he goes on: "Though numerous  
" early charters to the burgh are recorded and known,  
" I can find no trace of any other title in the burgh  
" of Dundee, and it was perhaps on no better title  
" than this ordinance, joined to the expediency of  
" preventing depredation and waste, that the Magis-  
" trates, in the beginning of the Reformation, asserted  
" a right to the buildings and other property of the  
" friars, including the hospital formerly belonging to  
" the brethren of the Holy Trinity, called Red Friars."

In these passages of the report the title of the burgh to the hospital is referred to no legal origin, and to no period anterior to the breaking up of the religious houses, or, at the earliest, to the beginning of the Reformation. But the documents which are in evidence appear to be strongly opposed to this view. It has been assumed throughout the inquiry that the tenement granted in 1390 by Sir James Lyndesay to the Red Friars as a hospital and Maison Dieu, for the support of the brethren, and the sick, old, and infirm dwelling therein, by his and his successors' appointment, is the same as the old hospital belonging to the burgh of Dundee. It is very difficult, however, to reconcile the possession of the burgh with this supposition, or with the notion of a possession originally taken at a time when, to use the words of the *Lord Justice-Clerk*, "the papal establishments were practically and *brevi manu* in a rough way abolished." We find the burgh in apparently peaceable connexion with the hospital, through a master belonging to their own body, as early as 1544, and it is not easy to understand how the Red Friars could at this period have parted with the management of possessions which were given to them for their own support, as well as for the poor committed to their charge. The idea of an unauthorized possession having been taken of the

hospital by the burgh after the religious orders, to use the words of Mr. Innes's report, "were broken up and scattered, about the year 1559-60," is irreconcilable with the proof of an earlier connexion of the burgh with the hospital, and with the nature of the transactions which took place with respect to it. In 1544 a grant was made by John Donaldson, a burghess of the town, to Robert Wylloe, senior, also a burghess, described as master for the time being of the hospital. It seems almost impossible to read this grant, and to believe that it refers to an establishment which the burgh had recently usurped from the Red Friars, and of which they were unlawfully and therefore precariously in possession. The transaction is inconsistent with any other state of things than the existence of a long settled and regularly established foundation in connexion with the burgh. The grant is to a person by name, as the master of the hospital "for the time being," words descriptive of a regular appointment, and irreconcilable with a supposed recent usurpation; and it is to him, "and his successors, masters of the hospital," terms which seem applicable only to some long existing and permanently continuing institution. Indeed, any grant at all to the hospital during the period of confusion and lawless appropriation out of which the title of the burgh is supposed to have originated is in the highest degree improbable. That the possession had therefore quietly settled in the burgh at this time appears not only from the terms of this grant, and of others which are in evidence, of a date anterior to Queen Mary's charter, but also from the regular and orderly manner in which masters of the hospital or almshouse were chosen by the Town Council. Mr. Innes, indeed, says in his report that "though the Council books extend back to 1553, the first recorded nomination of trustees of the alms-

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“ house is only in October 1563.” But it must be remembered that even this appointment is prior to Queen Mary’s charter ; that the entry of it is not as of something new, but apparently of an office previously existing and well known, and that the manner in which the election is made, viz., “for the year to come,” can leave but little, if any, doubt that masters of the hospital “for the time being” had been previously chosen, and that they existed by the appointment of the Town Council anterior, to Donaldson’s grant in 1544. I cannot, under these circumstances, bring myself to think that the hospital was one of those “friars’ places” to which the Act of Queen Mary and the Lords of Secret Council of 1561–2 applied. There were, however, in the town of Dundee, as in other burghs, possessions belonging to the religious houses to which this Act of Council would have special application. The confusion produced by the Reformation, and the invasion and spoliation of ecclesiastical property consequent upon it, made it necessary for the Queen to interfere, in order that a suitable provision should be made for the ministers of the reformed religion. Accordingly, the Act of Privy Council, dated 15th February 1562, declared that the third part of all benefices should be set apart for the service of the Government and the sustentation of preachers and readers, and be taken up by the persons to be nominated by Her Majesty ; and ordained that all annuals, mails, and duties payable within free burghs or other towns of the realm, as well pertaining to “chapellonries, prebendaries, as to freres,” together with the rents of the friars’ lands, wherever they be, “be intromitted with and taken up” by such as Her Grace shall depute thereto for employing of the same by Her Highness to “hospitaliteis, scoles, and other “godlie uses, as shall seem best by Her Highness, by

“ the advice of Her Council, and that the provost  
 “ and baillies of certain specified boroughs, or other  
 “ boroughs of the realm, to entertain and uphold the  
 “ friars’ places standing in the said towns, and to use  
 “ the same to the common weal and service of the  
 “ said towns,” “ ay and quhill the Queen’s Majestie  
 “ be further advysit, and tak finale ordoure in sik  
 “ things.” Under this interim arrangement it is pro-  
 bable that the Provost and Baillies of Dundee took  
 possession of certain of the friars’ places which were  
 still standing, and it is to these only that Queen  
 Mary’s charter appears to me to have subsequently  
 applied. Shortly before this charter, however, an  
 Act of Council was passed, which may throw some  
 light upon it. On the 10th January 1556-7 the  
 Queen and Lords of Secret Council, being well minded  
 that the ministers within the whole realm be “ enter-  
 tenet alsweil to burgh and land,” as Her Majesty  
 found the same at her arrival in Scotland, constituted  
 and ordained certain persons “ to appoint particular  
 “ taxation or imposition upon every burgh yearly for  
 “ the sustentation of the ministry.” And for relief of  
 the burghs the Queen “ gives and grants to the burghs  
 “ the annuals of altars, chaplainries, and obits within  
 “ the same, whenever the same shall happen to ‘ vaik’  
 “ by the decease of the possessors thereof, which as  
 “ yet remain ungiven and undistributed to any  
 “ person, and that to relieve the taxation and contri-  
 “ bution aforesaid, and the ‘ superplus ’ of the said  
 “ annuals and obits (if any be) to be distributed to  
 “ the poor and hospitals of every burgh within them-  
 “ selves by advice of the ministers and elders thereof.”  
 In this manner a portion of the subjects mentioned in  
 the Act of Council of 1561-2 were disposed of; the  
 rest remained to be employed as the Queen’s Majesty  
 should be further advised, and should take final order

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respecting them. Accordingly, the Act of Queen Mary of April 1567 directed the appropriation of everything which had been reserved by the Act of Council to the disposition of Her Majesty. In considering this charter, upon which the whole case appears to turn, it is necessary to determine, 1st, the objects for which it was made; 2nd, the subjects or property to which it applied. Upon the first point I feel no difficulty. The recital explains the cause which moved the Queen to make the grant, and which must therefore be taken to be the end and object of it. It was made in fulfilment of her duty in virtue of her office to provide for the ministers of God's Word and to support hospitals within the burgh.

I entertain no doubt, therefore, that in the words of the second Interlocutor appealed from, the claim of the ministers of Dundee to have suitable and adequate stipends provided for them out of the funds and estate of the foundation is one of the primary claims on the foundation. This point being settled, the question then arises, what are the funds and estate of the foundation? The subjects of the grant are accurately distributed by Mr. Innes, in his report. All these properties are united and incorporated into one body, to be called, "Fundatio nostra Ministerii et Hospitalitatis de Dundee." It does not appear to me that the hospital, which was then undoubtedly in the possession of the burgh, was included in any of the words of the grant, either specific or general. The absence of any specific mention of it was endeavoured to be accounted for from the circumstance of its being already in possession of the burgh, and because it was of small value compared with the other subjects of the grant. The argument derived from the comparative insignificance of the hospital estate was answered by a reference to the rental of 1581, by which it appears that it was of

greater value than all the other possessions included in the grant, except those of the Grey Friars. And as to the hospital not being named because the burgh had it already, it must be observed that it is an important part of the case that the burgh had recently before the charter obtained the hospital, not by any legal means, but by entering with a strong hand upon the possessions of the Red Friars. If under these circumstances it had been intended to clothe their illegal possession with a lawful title, it is inconceivable that the hospital should not have been expressly and specially named in the charter. That it really formed no part of the foundation is proved very clearly to my mind by what may be considered as a contemporaneous exposition of the Queen's grant. I refer to the rental which was produced by the burgh to the Lords Commissioners in the year 1573, and which is headed, "The rental of all chaplainries and  
 " annual rentes pertening to the choristoris, Black  
 " Freris, Grey Frieres, Grey Sisteris of the burgh of  
 " Dundee, disponit to the said burgh be the King's  
 " Majesties darrest moder for sustentatioun and  
 " uphauld of the minister, maister of the scuill,  
 " and pair of the said burgh, and utheris ordinaris  
 " concerning the ministrie." In this account, which was obviously intended to comprehend everything included in the Queen's donation, over which the Lords Commissioners exercised the power of allowing and disallowing items, there is no mention at all of the hospital property. If it had been amongst the subjects "disponed" to the burgh, it would undoubtedly have found its way into the rental, or its omission must have been noticed, and corrected before the account was passed. All the circumstances to which I have thus referred have convinced me that the hospital was held under a different and earlier title

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from that by which the burgh acquired the possession of the religious houses mentioned in the charter. As the Queen's donation and the hospital fund were applicable to different objects, it would have been proper for the burgh to have kept separate and distinct accounts of them in their books. And this they appear originally to have intended, for we find that a few months after the charter a collector of the Queen's donation was appointed, whose duty was expressly limited to the feu mails, annual rents, farms, emoluments, and various duties "which pertained of befor to the Gray Freiris and Blak, Gray Sist'rs, choristis, and chaplains of this bur<sup>h</sup>." But two years after the charter they seem to have taken a different idea of the matter, and to have considered that the master of the hospital ought to have the receipt of subjects of that donation, as well as of the funds of the hospital, and that all of them, without distinction, ought to be applied to the same objects. Accordingly on the 9th January. 1569-70, the provost, baillies, council, deacons of craft, and commonalty of the borough, by a deed of disposition reciting that the authority for the time had given to them and their successors "all and sundry the places, yards, crofts, acres, rents, feu mails, annual rents, emoluments, and other duties whatsoever which pertained to the Grey Friars, Black Friars, Grey Sisters, chaplainries, choristers, and hebdomadaries of the said borough, to have been applied to the upholding and sustentation of the ministrie of the said borough, as having respect and consideration that the poor, decayed, honest persons of this borough to be placed in the hospital of this borough or almsbouse thereof is one part and portion of the said ministerie of this borough, and that it belongs to us and to our duties for their sustentation to provide, they at this pre-

“ sent being all utterly destitute of any sufficient  
 “ rent to sustain them, disponed perpetually to the  
 “ master of the hospital or almshouse of the borough,  
 “ and successors, masters thereof, in name of the poor  
 “ which shall be placed therein, all and whole the pre-  
 “ sent places, yards, crofts, and acres of land, with all  
 “ and sundry their pertinents, which pertained to  
 “ the said Grey Friars, Black Friars, Grey Sisters,  
 “ and now to us, by reason of the disposition thereof  
 “ aforesaid, to be held of our Sovereign Lord and his  
 “ successors in free burgage, for payment of service of  
 “ the burgh used and wont, to be laboured, occupied,  
 “ and manured to the welfare of the poor persons of  
 “ the said hospital, and to no other use.” I do not  
 perceive that anything material turns upon the cir-  
 cumstance observed upon by the *Lord Ordinary*,  
 “ that this disposition or obligation is not a convey-  
 “ ance in the broad terms contained in Queen Mary’s  
 “ charter ; for that while the narrative of the obliga-  
 “ tion recites that the burgh had acquired right to  
 “ rents, feu mails, annual rents, emoluments, and other  
 “ duties which pertained to the Grey Friars, &c., the  
 “ dispositive clause to the master of the hospital is  
 “ limited to places, yards, crofts, and acres of land.”  
 But this disposition occasioned an improper diversion  
 of the Queen’s donation from some of its intended  
 objects ; for it excludes the ministers of God’s Word,  
 for whom it is was one main intention of the charter  
 to provide, from the benefit of any portion of the  
 fund, and directs it to be solely applied to the poor  
 within the hospital. The nature of Queen Mary’s  
 grant seems to have been misconceived by the Lords  
 Commissioners to whom the rental of the subjects of  
 the Queen’s donation was produced in the year 1573,  
 to which I have already referred ; for upon the dis-  
 charge claimed by the Council for one hundred marks

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paid to the minister, the Lords answer, " In the first  
 " anent the hundred merkes allowit to the minister,  
 " it is ordanit that the toun sall stent the nycbouris of  
 " the burgh for ane hundred markis to be payit yeerly  
 " to the minister, and sall pay the same be the said  
 " stent, to the effect that the rentis foirsaedes may be  
 " hailalie applyit to the sustentation of the pair for  
 " quilk it was foundat." The Lords Commissioners  
 thus appear to have construed the Queen's grant as if  
 it were intended, like the Act of Council of 10th  
 January 1566-7, to give the possessions of the reli-  
 gious bodies to the burgh merely for the relief of the  
 taxation for the support of the ministers, and not as a  
 fund originally applicable to their benefit. It is im-  
 possible to observe the language of the deed of dis-  
 position to the master of the hospital, and of the  
 answer by the Lords Commissioners to the discharge  
 claimed by the burgh for the 100 marks paid to the  
 minister, and agree with the *Lord Justice-Clerk* that  
 " this deed seems to demonstrate that in all the lan-  
 " guage of after minutes and documents the poor  
 " were taken to be included in the term used as a  
 " mode of designating the foundation generally, the  
 " leading object of which was the sustentation of the  
 " ministry." When, however, the master of the hos-  
 pital became the receiver, not only of the funds of the  
 hospital, but also of the revenues and profits arising  
 from the Queen's donation, as he had to account to  
 the same persons for the whole of his receipts, he  
 would naturally insert them together in one account.  
 Accordingly, in the first extant account of the master  
 of the hospital to the Provost and Baillies of the  
 borough, in the year 1581, the master gives in a  
 charge and rental, not merely relating to the lands  
 and tenements of the Grey Friars, Black Friars, Grey  
 Sisters, Choristoris, and Chaplainries " dotet to the said

“hospital by the Sovereign,” (as in the rental delivered to the Lords Commissioners), but also of the lands and tenements which pertained of old to the hospital. Whether the Town Council continued for some time longer to appoint a collector of the Queen’s donation does not appear; but on the 2nd December 1588 there is an acknowledgment of the receipt by the master of the hospital, from Wm. Man and Alex. Ramsay, of certain documents which had been placed in Mr. John Sharpe’s hands to defend an action against the township, and amongst them the Queen’s donation of all lands, tenements, and annual rents which pertained to the Friars and Chaplains within the said burgh. From this time the whole of the revenues, whether arising from the Queen’s donation or from the lands and tenements which had previously belonged to the hospital, appear to have been treated as one common fund, and were entered in the hospital books, and accounted for by the master of the hospital. By the charter of James VI., confirming that of Queen Mary, the terms of the original grant are repeated; but, in addition, His Majesty, for the sustentation of the ministers of the Gospel and the support of the hospital for the poor within the burgh, granted to the Magistrates, Council, and community a vicarage, with all its revenues, expressly “pro sustentatione ministrorum curam dicti burgi de Dundie gerentium et intertenimento pauperum infra hospitalitatem ejusdem residentium.” And by the subsequent charter of Charles the First in 1642, reciting that the common revenues and patrimony of the burgh were so scanty that with the vicarage they were not sufficient for the support of the common expense and for the sustentation of the ministers, the King grants in addition a certain duty on wine, for the sustentation of the ministers and also of the poor resident within the

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hospital. The *Lord Justice-Clerk* states, that, “ though  
 “ this does not appear from the accounts, the addi-  
 “ tional revenues arising from this gift of the vicarage  
 “ (it is supposed) became part of the general hospital  
 “ fund.” I think it is quite clear that the vicarage,  
 and also the duty on wine added by these charters,  
 were to be applied precisely to the same charges to  
 which the Queen’s donation was originally subject;  
 and I do not agree with the view suggested by the  
 Counsel, that these subsequent charters, by the general  
 words which they contained, enlarged the Queen’s  
 grant, or extended to subjects not comprehended  
 within it. From the close examination which I have  
 made of the documents, I have satisfied myself that  
 the revenues of the hospital, properly so called, were  
 inapplicable to any other purpose than the mainte-  
 nance of the poor within the hospital. And upon any  
 other view I find it impossible to explain the recital  
 and provisions of one of the Acts which was men-  
 tioned in the course of the argument, and which,  
 though temporary merely, and now expired, yet for  
 the purpose for which it was referred to is extremely  
 important. The 20 Geo. 2. recites that “ Whereas it  
 “ is found proper and necessary that the hospital in  
 “ the said town now used for the reception of decayed  
 “ burghers should be converted into and made use of  
 “ as a workhouse for employing and setting to work  
 “ the poor inhabitants of the said town, and that the  
 “ revenue appointed for the support and maintenance  
 “ of the said decayed burghers should be applied for  
 “ and towards paying pensions constantly to them  
 “ for the time being for their support and mainte-  
 “ nance ;” and then proceeds thus, “ And forasmuch as  
 “ the annual revenue applicable for the relief of the  
 “ poor burghers of the town of Dundee may in some  
 “ years amount to more than will be necessary to pay

“ to such poor burghers for their support and maintenance: Be it enacted, that in case any overplus money shall at any time remain in the hands of the Magistrates and Town Council after the pensions shall be paid to such burghers, it shall and may be lawful for the said Magistrates and Town Council from time to time to lay out and apply such overplus money for and towards the repairing the said workhouse, and maintaining the poor therein.”

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This Act is utterly irreconcilable with the notion that the ministers of Dundee had any claim upon any portion of these particular funds, and it sanctions the appropriation which had been made of them to the support of decayed burghers. And it may be observed that even if it could have been shown that the burgh had misapplied these hospital funds, yet the ministers would have no right to complain of the misappropriation, unless they could have proved that they had an interest in them. I do not think that the circumstance of there having been payments made to the ministers by the master of the hospital from time to time is at all material to the decision of this question; for the observation of the *Lord Justice-Clerk* is perfectly correct, that “there can be no prescription against the express and declared object and condition of the grant, and the Defenders, as administrators, cannot found on any prior application of the funds in order to defeat the object for which alone they obtained the grant.” If, therefore, the ministers had no right under the grant of Queen Mary, the payments made to them by the burgh could not establish a right; and if they were entitled to a provision by the terms of that grant, the varying amount of the payments made to them from time to time would not leave them to the arbitrary discretion of the burgh to give or withhold this provision at pleasure. But in

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fact during the whole time the ministers had an undoubted right to have suitable and adequate stipends provided for them out of "the foundation of the ministry and hospital of Dundee," created by the union and incorporation of the possessions of "the Dominican or Preaching Friars, Minorites or Franciscans, and nuns commonly called the Grey Sisters" in the Charter of Queen Mary. It is said that there is no difficulty in distinguishing the property which (thus explained) may be called the Queen's donation from that of the hospital proper. But if any such difficulty should arise, it ought to turn to the prejudice of the burgh, and not to that of the ministers. The Council have chosen to blend together funds which ought to have been kept separate, and those who are interested in a portion of these funds, apart from the Act, are entitled to have every intendment made in their favour where the particular property upon which their rights attach cannot be distinguished. Upon the view which I have thus taken, I do not think that any grants or bequests which have been made to the hospital whether generally, or expressly for some particular objects, can be properly made to form any part of "the foundation" out of which the ministers' stipends are to be provided for. But where purchases have been made from time to time out of the common funds received by the hospital master, "the Foundation" ought to have the benefit of these acquisitions in the proportion which its revenues bear to those of the hospital estate. There may be great difficulty in ascertaining and distinguishing the property in this manner, but in no other mode, in my judgment, can justice be done between the parties. With respect to Monorgan's croft I agree with my noble and learned friend (Lord *Cranworth*) that it clearly appears that an ascertained portion of John-

ston's legacy was invested in its purchase, and as the legacy was given for the yearly maintenance of the aged and impotent people of the town of Dundee it is inapplicable to the stipends of the ministers. The second Interlocutor must therefore be varied in this respect, and as to the Interlocutors generally, I am of opinion that they are correct in their findings, subject to the observation which I have made as to the ambiguity of the words "now commonly known as the "Hospital Fund," in the first Interlocutor, and with the exception of the finding in the second Interlocutor, that "the old hospital and its property fell within "the scope of the general terms of Queen Mary's "grant, and became part thereof." But as my noble and learned friend differs with me as to my construction of the grant, his opinion must prevail.

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Mr. *Rolt* : I believe it will be necessary in point of form that the Appeal generally should be dismissed, except as to the fourth finding in the second Interlocutor. As to costs, it will be for your Lordships to say whether they should be of the whole, or of that part of the Appeal which is dismissed.

Lord CRANWORTH : The first Interlocutor will be affirmed, and the Appeal dismissed with costs. As to the second Interlocutor, the cause will be remitted with a declaration as to Monorgan's croft.

#### JUDGMENT.

It is *Ordered* and *Adjudged*, That the said Interlocutor of the Second Division, of the 18th of July 1856, be, and the same is hereby affirmed ; and that the said Appeal, so far as relates to the said Interlocutor, be, and the same is hereby dismissed this House ; and that the said Interlocutor of the Second Division, of the 18th of March 1858, except so much thereof as finds that the ground called Monorgan's croft was purchased out of the accumulations and savings of the general funds of the hospital, and belongs to

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the foundation, and finds that the hospital at different times received the whole legacy left by Robert Johnston of London, amounting to one thousand pounds sterling, to be employed by the Provost and Bailies of Dundee in the “yearly maintenance of “the aged and impotent people” of the said town, and that the annual interest of one thousand pounds must be held applicable to that purpose in framing a final state of accounts, and that, as to past administration, as the interest of that sum was to be strictly so appropriated, it must be held that it was fully accounted for by the charities to which the funds generally of the foundation were applied, be, and the same is hereby also affirmed, with the declaration that the ground called Monorgan’s croft must be deemed to have been purchased in the year 1646 with part of the legacy of one thousand pounds bequeathed by the will of Robert Johnston, in order that the same might thenceforth be held upon the trusts by the said will declared concerning the said legacy: And it is further *Ordered*, That the Appellants do pay or cause to be paid to the said Respondents the costs incurred by them in respect of so much of the said petition and Appeal as stands dismissed as aforesaid, the amount thereof to be certified by the Clerk of the Parliaments: And it is further *Ordered*, That the cause be remitted back to the Court of Session in Scotland, to do therein as shall be just, and consistent with this declaration and this judgment: And it is also further *Ordered*, That unless the costs, certified as aforesaid, shall be paid to the parties entitled to the same within one calendar month from the date of the certificate thereof, the Court of Session in Scotland, or the Lord Ordinary officiating on the bills during the vacation, shall issue such summary process or diligence for the recovery of such costs as shall be lawful and necessary.

LOCH & MCLAURIN—SIMSON & TRAILL.