

FIRST CAUSE.

MARGARET CLEPHANE, ET AL., Beneficiaries or Pensioners entitled to and enjoying the Benefits of the Trinity Hospital of Edinburgh, APPELLANTS.
 THE MAGISTRATES AND TOWN COUNCIL OF EDINBURGH, RESPONDENTS.

SECOND CAUSE.

THE MAGISTRATES AND TOWN COUNCIL OF EDINBURGH, APPELLANTS.
 WILLIAM FORRESTER, ET AL., RESPONDENTS.

Charity Trust—Church destroyed—Fac simile Restoration not always imperative.—Charity Trustees erecting an edifice in lieu of one destroyed are subject to no general obligation of adhering rigidly to the form or dimensions of the original fabric, especially if that fabric was in itself unfinished or inadequate, or has in the lapse of time become unsuitable.

1864.
 Feb. 11th, 12th,
 and 15th.

In 1461 Mary of Gueldres, Queen Consort of James II., King of Scotland, founded a collegiate church at Edinburgh for a provost, eight prebendaries, and two choristers. Close to the church she also erected a Hospital for certain bedesfolk. The patronage and property of this benefaction came after the Reformation to be vested in the Magistrates of Edinburgh, partly by regal grant, and partly by purchase. The church which had been used during three centuries not only for the benefit of the charity, but also as a parish church, was taken and demolished by a Railway Company;—they engaging to pay a sum of money in compensation. By their Act they were to rebuild the church on the original model; or, as an alternative, the Magistrates were “authorized to accept the money in lieu of the obligation” *upon the trusts of the charity.* Held by the House (reversing the judgment below), that in building a substitutionary church the Magistrates, as trustees of the charity, were not bound to adhere to the dimensions or the architec-

MARGARET
CLEPHANE, ET AL.
v.
THE MAGISTRATES,
& C. OF
EDINBURGH.

tural style of the original foundation, but might consult the requirements of an expanded population.

Per the Lord Chancellor (*a*): This money, when received by the trustees of the charity, is not to be expended in the actual reproduction of the original fabric, with all its architectural decorations.

Per Lord Cranworth: When the money comes into the hand of the trustees, they have no other obligation than would have been imposed if the church had been in some other way destroyed. The legislature could not mean to alter the trusts, and there was no trust to build ornamentally.

Per Lord Chelmsford: There was not the least intention that the obligation which attached to the Railway Company should be transferred to the trustees.

Pleadings in Charity Cases.—Want of form and mistakes in pleading are overlooked in charity cases.

Judgment with consequential Directions.—Case in which the House not only declared the principle of its order, but followed up the same by elaborate and minute directions for the purpose of terminating by anticipation a course of litigation which had rendered the charity inoperative for sixteen years.

THE circumstances of this case are fully set out in the Second Series of the Court of Session Cases (*b*), and appear sufficiently from the judgment of the House.

Mr. *Anderson* and Mr. *Witherspoon* were of Counsel for the Appellants, Clephane et al.

The *Attorney-General* (*c*) and Mr. *Selwyn* for Forrester et al.

For the Magistrates and Town Council of Edinburgh, Mr. *Rolt* and Sir *Hugh Cairns* appeared.

The following opinions were delivered by the Law Peers:—

*Lord Chancellor's
opinion.*

THE LORD CHANCELLOR (*a*):

My Lords, I think it desirable to call your Lordships' attention particularly to this case, the circum-

(*a*) Lord Westbury.

(*b*) Vol. 22, p. 1222.

(*c*) Sir Roundell Palmer.

stances of which I will, with your Lordships' permission, carefully review, in the hope that not only the grounds of your Lordships' decision may be fully stated and well understood, but also in the hope, which I am almost afraid to entertain, that further litigation in this matter may be prevented.

MARGARET
CLEPHANE, ET AL.
v.
THE MAGISTRATES,
&C. OF
EDINBURGH.

*Lord Chancellor's
opinion.*

The case is one of very great simplicity, and to a mind acquainted with the subject, and with the principles which ought to govern the administration of charities, it can present no difficulty. The material facts are these:—Anterior to the Reformation, and from a foundation made in the fifteenth century, there was established in Scotland, immediately without the precincts of the city of Edinburgh, but now, I believe, included within those precincts, a College, or, as we should call it in England, a chantry of priests, to which an almshouse or hospital was annexed. It appears that the ecclesiastical part of this eleemosynary foundation consisted of a provost, eight prebendaries, and two choristers. The purely eleemosynary part of it consisted apparently of 13 poor bedesmen.

There was attached to the college a church, built in a very beautiful manner, and presenting, though imperfect, a fine specimen of the order of architecture according to which it was erected. This church consisted merely of a choir and what is called in Scotland a cross, or by us more frequently a transept (*a*). It was undoubtedly of dimensions far

(*a*) Per Lord Deas: The church subsisted as a church devoted to the purposes of worship in Roman Catholic times, and was available to be used in the same way in connexion with the Reformed religion. As an architectural structure the building was incomplete. The choir and the cross and the central tower had alone been erected. These, however, of themselves constituted a church, which admittedly was admired by many as a remarkable specimen of the order of architecture to which it belonged. Mary of Gueldres took a pride in it in her lifetime, and her remains (by her directions, I presume,) were interred in it after her death.

MARGARET
CLEPHANE, ET AL.
v.
THE MAGISTRATES,
& C. OF
EDINBURGH.

*Lord Chancellor's
opinion.*

beyond what was required by the priests and by the bedesmen, and therefore it is reasonable to infer that it afforded accommodation to the neighbouring residents.

In this state of things the Reformation swept over Scotland. The priests were driven out of the place. The bedesmen were permitted to remain, but it would seem that the church was disused for some time, and part of the hospital appears to have fallen into a state of ruin.

During the infancy of King James the First (*a*) the royal charter of 1567 (*b*) was granted to the Magistrates of Edinburgh, being a grant of the whole of the church called the Collegiate Church of the Trinity, with the churchyard, buildings, and so forth appertaining thereto, and also the hospital, at that time denominated Trinity Hospital. The purposes of the grant appear to be these: an obligation is thrown upon the Magistrates to rebuild or construct the hospital, and to support the poor and the sick who were the objects of the charity, and it is provided that the whole of the property so granted should be devoted to these uses, and to none other.

It would seem that the master of the hospital, that is, the superintendent of the poor men, had continued to reside in the hospital at the time of the grant, and accordingly we find a contract between the Magistrates of Edinburgh and the master of the hospital, a person of the name of Robert Pout, which it is material to advert to only for the purpose of pointing out to your Lordships that Mr. Pout surrendered into the hands of the Crown, for the benefit of the grantees, namely, the Magistrates of Edinburgh, the benefice of Trinity College, and all the things appertaining to it, and that in consideration of this transfer the Magis-

(*a*) *i. e.*, King James the First of England and Sixth of Scotland.

(*b*) Nov. 12, 1587.

trates paid to Mr. Pout a sum of money, and the Magistrates also contracted to pay Mr. Pout the sum of 160*l.* Scots yearly during his lifetime. I advert to this only for the purpose of pointing out that it is reasonable to infer that some money was paid by the Magistrates, probably out of their own funds, for the purposes of this charity.

MARGARET
CLEPHANE, ET AL.
v.
THE MAGISTRATES,
& C. OF
EDINBURGH.

Lord Chancellor's
opinion.

Another grant was made by King James in the month of June 1585 (a). Its materiality as bearing upon the present subject of inquiry lies in the fuller description which it contains of the objects of the grant, which it declares to be "*pro sustentatione*" (b), for the maintenance of the aged and decrepid men, orphans, and poor within the hospital, and poor scholars within the college and schools, at all times thereafter. The charter also proceeded to authorize the Magistrates and Council to rebuild the hospital, which was then in a ruinous condition, in a more convenient situation at or near the college.

A little anterior to this particular grant, in the year 1584, the Magistrates appear to have divided the town or city of Edinburgh into four districts or parishes, and on the 14th of October 1584 a resolution or order was made by the Town Council, by which the Trinity College Church, that is the church of this charity, was appropriated for the accommodation of the north-east parish or district. I wish particularly, therefore, to point out to your Lordships that from the very earliest times, and as soon as it could be supposed that the grantees took possession of the subject of the grant, there was a dedication of the collegiate church (so far as it could be applied without prejudice to the use of the hospital) to the accommodation and service of the inhabitants of the district.

(a) June 22, 1585.

(b) Pro sustentatione seniorum, decrepitorum, orfanorum, et pauperum, &c. Sic.

MARGARET
CLEPHANE, ET AL.
v.
THE MAGISTRATES,
& C. OF
EDINBURGH.

*Lord Chancellor's
opinion.*

The hospital was rebuilt by the Magistrates of Edinburgh, and then come two important charters of May and July 1587. By the charter of May 1587 (a) it is stated "that it shall be lawful for the Provost and Magistrates, and their successors, to use the old hospital, in order that they may be able to support the poor within the hospital, which has been recently repaired by them, by means of the rents of the said hospital in a convenient manner."

Then, in a subsequent charter of the 29th July 1587, there is a declaration that "the grant is for the support of the ministers and the poor, and for the entertainment of the said college" (that, I suppose, means for the preservation or the maintaining of the said college) "lately erected by them," that is, the Magistrates. Then follows a provision that the provost and community, and their successors, shall be bound to support the ministers serving at the churches.

To all this may be added an Act of Parliament, passed in 1592, which recognizes the position of the Council and Magistrates with respect to this charity.

The church, therefore, had been dedicated to the purposes of the district, so far as it was not required for the hospital; that use of the church, which must have been then perfectly well known, is nowhere adverted to as being at variance with the purposes of the charity, and it must be taken to have been sanctioned and confirmed by the subsequent grants to which I have adverted.

It appears, moreover, to have been admitted that Trinity College parish or Trinity College district was well known as one of the parishes or districts into which the city was divided, and that the building therein used as the church has been constantly treated as if it were the parish church of that district.

(a) May 26, 1587.

Now from these facts, therefore, I submit to your Lordships that two conclusions may with propriety be drawn; first, that the permitting Trinity Church to be used as a place of worship for the inhabitants of the district, after reserving full accommodation for the poor and the officers of the hospital, was not a breach of trust, but was perfectly consistent with the purposes of the charitable grant; and, secondly, that, inasmuch as such user has continued uninterruptedly from the foundation of the charity to the present time, it must be considered that the maintenance of the church for the use of the hospital and of the inhabitants of the adjoining district is one of the lawful purposes of this charity.

'MARGARET
CLEPHANE, ET AL.
v.
THE MAGISTRATES,
&C. OF
EDINBURGH.

Lord Chancellor's
opinion.

I now, my Lords, pass on to the transactions which have subsequently occurred, and which have given rise to this litigation.

The North British Railway Company was empowered by its Act of Parliament to take for the purposes of its railway, and for the purpose of constructing a station for that railway, the piece of land on which this collegiate church stood, and of course it was a matter of great importance that the terms and conditions on which the Railway Company should be permitted to take this land should be accurately and clearly defined in their Act of Parliament.

The object of an Act of Parliament of that kind is to define the manner in which the Railway Company shall be bound to make compensation to the owner of the property taken, but it is not a part of the object of such an Act of Parliament to interfere at all with the title to that property, or to lay down any rule affecting the ownership of the property or the manner in which the money to be given to the owner of the property shall be enjoyed. To do any such thing would be greatly beyond the proper scope and limits of that description of legislation. The section, read-

MARGARET
CLEPHANE, ET AL.
v.
THE MAGISTRATES,
& C. OF
EDINBURGH.

Lord Chancellor's
opinion.

ing it shortly (*a*), may be divided into three parts. The first portion of it enables the Company to restore and rebuild the church which they propose to take down, and in the event of their doing so, the obligation is carefully imposed upon them of restoring and rebuilding it exactly as they found it at the time when they took possession of it. And in order to meet any questions that might arise in the course of that operation, an arbiter is provided, namely, the Sheriff of Edinburgh, to whom any differences of opinion arising in the course of that operation might be referred. Then the section concludes with an alternative, which it is put in the power of the Railway Company to adopt, namely, that in lieu of the obligation which has been thus carefully described, to rebuild the church themselves, they may give to the Magistrates and Town Council a sum of money as compensation for the church. And by a species of refinement, which I regret that any person has been found to sanction (because it has produced years of litigation, and has been an impediment to the use and application of the

(*a*) The provision is, "That it shall not be lawful for the North British Railway Company to make any alterations on, or to use for the purposes of the said railway, the additional land in the parishes of Trinity College, St. Andrews, and Canongate, which by this Act they are authorized to purchase for a terminus in Edinburgh, until they shall have agreed with the Lord Provost, Magistrates, and Town Council of the said city on a plan for the removal and rebuilding, at the expense of the Company, on another site, either within the said parish of Trinity College, or as near thereto as conveniently may be, of a new church, with equal convenience of access and accommodation to that already existing in the said parish; and that in such agreement provision shall be made for the adoption of the same style and model with the existing church. Provided always, that any difference of opinion between the parties, regarding the plan or site of the said new church, shall be subject to the arbitration of the Sheriff of Edinburgh." It was, however, thereby declared, "that it shall be competent to the Railway Company to offer, and the Magistrates and Town Council are hereby authorized to accept of a sum of money as compensation for the said church, and in lieu of the foregoing obligation."

money belonging to this charity), it appears to have been thought that it was possible to construe the clause in such a manner as to attach to the money to be paid by the Railway Company an obligation of application precisely to the same effect as that which the Railway Company would have been bound to observe in the event of their adopting the first alternative of undertaking to restore the church.

MARGARET
CLEPHANE, ET AL.
v.
THE MAGISTRATES,
& C. OF
EDINBURGH.

Lord Chancellor's
opinion.

My Lords, I think it impossible that any such ingenious subtlety should receive acceptance. One of your Lordships (a) suggested what is the true interpretation, as I humbly think, of the words "in lieu of the foregoing obligation," namely, that the obligation of restoration which is described in the first part of the clause, if it be not the alternative embraced by the Company, is still to be the measure of the amount of compensation. So that in point of fact the object of the clause is this, that if the Company did not undertake to restore the church actually, they were bound to pay to the Magistrates, as trustees of the charity, such a sum of money as they would have been required to expend if the first alternative had been embraced by them. That is a reasonable interpretation to give to the clause, and it gives a standard of the compensation to be paid; and, practically, this was the construction which the parties put upon the clause; for proceedings were taken to ascertain what ought to be done in order to restore the church, and they were prosecuted so far as to enable the referee to determine exactly the sum of money which the Railway Company would have to expend if they had entered upon and completed the work of restoration. The Railway Company very wisely preferred to pay the money rather than to undertake the duty of seeing to its expenditure and presiding over the restoration of the

(a) Lord Chelmsford.

MARGARET
CLEPHANE, ET AL.

v.
THE MAGISTRATES,
& C. OF
EDINBURGH.

Lord Chancellor's
opinion.

church. And that sum of money, which is very considerable, amounting altogether to 17,671*l.* 9*s.* 6*d.*, was actually paid over to the trustees of the hospital in the month of May 1848.

Now, my Lords, that money, when received by the trustees of the hospital, was part of the general funds of the charity, applicable to the re-instating of the church in a reasonable manner. But, my Lords, it would be ridiculous to suppose for a moment that it was the object of the Act of Parliament, or that there can be any principle of law or any suggestion of reason or common sense that would lead the mind to the conclusion that this money, when received by the Magistrates and Town Council, was received under an obligation to have it expended entirely, or the greater part of it, in the actual reproduction with all its architectural decorations of that exact building which was taken by the Railway Company. It is a lamentable thing that such a suggestion was ever made, and it is as unfounded in law as it has been lamentable in its consequences; and I hope your Lordships will not give the smallest countenance to any such contention, which must be repudiated by any one knowing well the principles upon which charities ought to be administered.

This, my Lords, leads at once to this conclusion, that the suit, which was brought expressly for the purpose of maintaining the proposition that the whole of the money paid by the Railway Company should be dedicated to the purpose of an exact reproduction of the original building, is founded upon an entire misconception and erroneous construction of the clause of the Act of Parliament; and therefore I have not the smallest hesitation in advising your Lordships that the whole of the Interlocutors in that suit which have been appealed from should be reversed, that the

Defenders shall be absolved from the conclusions of the summons, and the summons itself be dismissed. I am sorry to be obliged to add, in consequence of the countenance that has been given to that suit, that I cannot individually advise your Lordships to go further than to dismiss it without expenses.

MARGARET
CLEPHANE, ET AL.
v.
THE MAGISTRATES,
& C. OF
EDINBURGH.

Lord Chancellor's
opinion.

Then, my Lords, that suit being cleared away, we come to the consideration of the other suit, originally instituted by persons having a direct interest in the charity, as being some of the objects of that charity. To that suit the Magistrates and Town Council of Edinburgh are called as Defenders in their capacity of trustees of this hospital; and although there has been a good deal of criticism upon the conclusions of that summons, and although it is true that some of the conclusions are rather directed to an end that would be inconsistent with the re-erection of a church sufficient for the accommodation of the inhabitants who resorted to the old church, yet I think the conclusions of that summons, fairly construed, especially in a charity case (*a*), might well have warranted the Court of Session in taking upon themselves to pronounce in that suit the order which I think common sense and reason imperatively required should be pronounced in some suit or other, directed to the end of effecting the proper administration of this charity property, and the proper application of this sum of money, which has been allowed to remain so long unappropriated.

Therefore I shall not hesitate to recommend your Lordships to reverse the Interlocutors which are appealed from in that suit. And further, I shall recommend your Lordships to make that suit the basis or

(*a*) See Attorney-General *v.* Jackson, 11 Ves. 365, and Attorney-General *v.* Corporation of Rochester, 3 De Gex., M. and G. 811.

MARGARET
CLEPHANE, ET AL.
v.
THE MAGISTRATES,
& C. OF
EDINBURGH.
*Lord Chancellor's
opinion.*

foundation of an order which I trust, if your Lordships approve of it, will be found to comprehend all the material objects that now require to be provided for, in the hope of securing a just and reasonable administration of this charity.

The Magistrates have suggested that a sum of 7,000*l.* only is required for the acquisition of a site and for the erection of a new church of sufficient capacity to provide for the wants of the inmates of the hospital on the enlarged scale on which I hope it will be established, and also for the accommodation of the neighbouring inhabitants. I wish I could add to that what I have looked for with anxiety—a clear and definite expression on the part of the Magistrates of their willingness to have this fund devoted to the purpose of a proper augmentation and re-establishment of this charity, after deducting so much as should be required for erecting the new church. But what I have not found so clearly expressed in the pleadings has been supplied by the Counsel for the Magistrates at the bar; and I understand from their Counsel that they are quite willing (as it is their duty to be) that the whole of this fund, minus the sum that shall be absolutely required for the rebuilding of the church, shall be at once applied in the augmentation of the charity.

In the hope, therefore, my Lords, of providing for these ends, which, as I observed during the argument, at the first blush of the thing must have presented themselves as being the clear objects to be attained by a court of justice in this case, I have at some length penned the order, which I will submit to your Lordships as the proper order to be pronounced under the circumstances of the case (*a*).

(*a*) See the judgment of the House at the close of the Case.

My Lords, I humbly submit to your Lordships that this order will, as far as we can now foresee, provide for the immediate necessities of the case. And I trust that there will be found in carrying this order into effect a conscientious spirit that shall recognize the religious and moral duty that rests upon these parties no longer to keep this fund in abeyance, but to apply it, as it ought 15 or 16 years ago to have been applied, to the purposes of this useful charity.

MARGARET
CLEPHANE, ET AL.
v.
THE MAGISTRATES,
& C. OF
EDINBURGH.

*Lord Chancellor's
opinion.*

Lord CRANWORTH :

*Lord Cranworth's
opinion.*

The long usage since the time of the charter seems perfectly to justify this House in saying that the maintenance of the church as connected with the hospital is one of its legitimate objects. That being so, supposing no Act of Parliament had passed such as that of the North British Railway Company, but that, by lapse of time or by some accident, the church had been burnt down or destroyed, what would have been the duty of the trustees? Clearly to build a church with at least as good accommodation as that which existed before. But there would have been no duty or obligation to rebuild it in the particular ornamental style in which the old building had been constructed. That being so, it is impossible to suppose that the Legislature, in passing a Railway Act, meant to alter the trusts which were imposed upon the trustees. It is impossible that it could have meant to impose upon them the duty of building a church in any particular style. The reason why that obligation was imposed upon the Railway Company, if they rebuilt the church, is obvious. Had such an obligation not been imposed upon them, they might have built the church in a very imperfect and improper style. It was to secure the public against that, that this provision was made. But if the alternative was

MARGARET
CLEPHANE, ET AL.
v.
THE MAGISTRATES,
&C. OF
EDINBURGH.

—
*Lord Cranworth's
opinion.*

adopted, which any one looking reasonably at the subject must have known would be adopted, namely; for the Company to pay the price or the value instead of rebuilding the church themselves, then, when the money comes into the hands of the trustees, they have no other obligation upon them with reference to that money than would have been imposed upon them if the church had been in some other way destroyed, and then rebuilt out of any funds which they might have in their hands for the purpose of rebuilding it.

I think that the provisions which have been proposed by my noble and learned friend exhaust the subject, and I trust that they will put an end to this not very creditable litigation, which has now extended over a period of 15 or 16 years, and deprived both the hospital and the neighbourhood of the advantages which they have a right to derive from the use of the church.

*Lord Chelmsford's
opinion.*

Lord CHELMSFORD :

My Lords, I concur in the view that has been taken of this case by my two noble and learned friends, and I can state the grounds of my opinion in a very few words. In order to ascertain what was the trust that attached upon this church, and the consequent obligation upon the Corporation of Edinburgh at the time of the passing of the North British Railway Company's Act, it will only be necessary for me to advert very shortly to the terms of the charter of 1567. Now what was the object of that charter? It is expressed very shortly in the recital to be "to found and endow an hospital," and for that purpose certain property, including the church in question, called the Collegiate Church of Trinity, was given to the Corporation of Edinburgh for the building and construction of the said hospital for the maintenance of the poor and sick,

to be placed by them therein for no other use. And there is subsequently given a power to the Corporation to dispose of this property as to them shall seem good, with a qualification that they shall be bound to apply it to the foresaid use and no other. Now, whether this means that they were to apply the existing subjects of the grant to the purposes of the hospital, or whether they were entitled to sell the property, and apply all the proceeds to that use, it is immaterial to consider. Throughout the whole of this charter there is nothing to bind the Corporation to maintain this church; there is nothing to show that, either as a work of art or for any other reason, it was such an object of interest that it was considered desirable to preserve it. I apprehend that under the words of the charter it was competent to the Corporation to apply the building itself, the church, to the purposes of the hospital, and there is nothing whatever to prevent their doing what they did, namely, applying the church to the use, for which it was fitted, for the purposes of divine worship.

Now originally, for about 17 years, the church appears to have been applied exclusively to the use of the hospital, but in 1584, and again in 1625, it was appropriated to one of the parishes into which Edinburgh was divided. Now, whether the Corporation had a right to appropriate this church as a parish church may perhaps be questioned, but undoubtedly, as there was sufficient accommodation, not only for the inmates of the hospital, but beyond what was necessary for them, it could have been no breach of trust on the part of the Corporation to allow the inhabitants of the parish, that is, the inhabitants of the neighbourhood of the hospital, to have sittings in the church. Even if it were objectionable, there were no persons who were likely to object to it,

MARGARET
CLEPHANE, ET AL.
v.
THE MAGISTRATES,
& C. OF
EDINBURGH.

—
*Lord Chelmsford's
opinion.*

MARGARET
CLEPHANE, ET AL.
v.
THE MAGISTRATES,
& C. OF
EDINBURGH.

*Lord Chelmsford's
opinion.*

because it seems that the inmates of the hospital were invariably provided with free sittings, and the other persons, the inhabitants of the parish, paid for the sittings which they occupied, and all the sums received in respect of those payments were applied to the maintenance of the church, and therefore so far the funds of the hospital were relieved.

Thus matters continued from the year 1584 down to the year 1846, and it is perfectly clear, I apprehend, that, although the Corporation had applied this church as a parish church, and therefore in some degree had taken it from the hospital, yet, inasmuch as the trusts of the charter are perfectly clear, it was not competent to them to divert that church from the uses to which it was applicable under the charter.

Therefore in 1846, at the time of the passing of the North British Railway Act, the state of things was this—that the church which was applicable to the uses of the hospital had to be maintained by the Corporation, and maintained, if you please, to the extent of the use to which it had been applied for so many years, nearly three centuries, namely, for the accommodation beyond the inmates of the hospital of other inhabitants of the neighbourhood. Therefore, as my noble and learned friend near me has said, the obligation upon the Corporation at the time of the passing of the North British Railway Act, in case the church had been burnt down and it had been necessary to restore it, would have been merely to provide another church with equal and similar accommodation to that which had been provided for the long period I have mentioned. Then, my Lords, it appears that the North British Railway Company, upon the introduction of their Bill, desired to obtain powers for the purpose of removing this church for the construction of their railway. And if the question of compen-

sation between them and the Corporation had been left to the ordinary provisions of the Lands Clauses Act (an Act which passed, I think, only the year before this North British Railway Act), it is perfectly clear that all that the Corporation would have been entitled to receive as compensation would have been the amount which was necessary to build a church with similar accommodation to the one which was removed. And no jury would ever have given them what may be called a sentimental value for the church which was to be removed, however great its architectural beauty might have been. But the Corporation were desirous of obtaining a larger sum than they could possibly have obtained by the ordinary mode of compensation, and the Company were not unwilling to give them the advantage of a larger compensation than they would have received through a jury. Therefore I consider this 8th section of their Act to have been introduced for the purpose of providing machinery to enable the Corporation to receive a larger amount of compensation than they would otherwise receive. Now, the mode which was adopted for that purpose was very plain. The Legislature provide that the Company shall not be allowed to remove the existing church until they shall have agreed with the Corporation on a plan for the rebuilding, at the expense of the Company and upon another site, either within the parish or as near thereto as conveniently may be, of a new church, and that in such agreement provision shall be made for the adoption of the same style and model as the existing church.

Now that, as I apprehend, was the mode of ascertaining the value of the compensation which was to be paid to the Corporation. Plans, of course, would be made, a suitable site would be ascertained, and an estimate would be made of the value of the site and

MARGARET
CLEPHANE, ET AL.
v.
THE MAGISTRATES,
& C. OF
EDINBURGH.

*Lord Chelmsford's
opinion.*

MARGARET
CLEPHANE, ET AL.
v.
THE MAGISTRATES,
& C. OF
EDINBURGH.

*Lord Chelmsford's
opinion.*

of the cost of the building according to the plans which were agreed upon, and if there were any difference of opinion between the parties the sheriff was to settle it. But in that mode the sum of money was ascertained as the amount of compensation which the Corporation would be entitled to receive under this clause in respect of the church.

And then, in order to provide for this money passing into the hands of the Corporation, the Act declares that the Company shall be at liberty to offer, and the Corporation to accept, "a sum of money as compensation for the said church, and in lieu of the foregoing obligation." It is quite clear that the contemplation of all parties was that the cost of the erection of the church according to the plans upon a proper site having been ascertained, then that sum of money should be the amount which should be paid over by the Railway Company, and received by the Corporation, as the amount of compensation to be received by the Corporation in lieu of the obligation which was imposed upon the Railway Company. There was not the slightest intention that there should be any new obligation imposed upon the Corporation to erect the church in any different manner than they would have been required to do, supposing it had been left to the ordinary mode of compensation. There was not the least intention that this obligation, which was attached upon the Railway Company merely for the purpose of fixing the value, should be transferred from the Railway Company to the Corporation upon the payment of the money. If that had been intended, it would have been easy to add just a few words, and after the words "in lieu of the foregoing obligation," to have said "which obligation shall then be transferred to and fulfilled by the Magistrates and Town Council." But no such obligation is imposed upon the Corpora-

tion. The money is transferred to them by this machinery which the Act has provided, and then the Corporation have only the same obligation attaching upon them which they would have had if this clause had never been introduced into the Act. They are bound to provide a church with the same accommodation as that which previously existed, and that being so, it is quite clear that only a portion of the sum of 17,000*l.* would be applicable to that purpose. The sum of 7,000*l.* seems to be a very fair limit to their liability in that respect. The other 10,000*l.*, the surplus, is clearly applicable to the uses of the hospital. My Lords, for these reasons I entirely agree with the opinion which has been so clearly expressed by my noble and learned friend.

MARGARET
CLEPHANK, ET AL.
v.
THE MAGISTRATES,
& C. OF
EDINBURGH.

Lord Chelmsford's
opinion.

Sir *Hugh Cairns* : Before the question is put, will your Lordships allow me to submit two considerations which, perhaps, your Lordships might think it right to give weight to in your order. The first relates to the costs. Your Lordships propose (as I understood) to dismiss Forrester's action without costs. I would submit to your Lordships that provision should be made in your order for the costs of that action, and of the Appeal of the Corporation, and also (which would be necessary in point of form) that provision should be made for the repetition or repayment by Forrester of the costs ordered to be paid to him, and which have been paid ; and, further, that in Clephane's action, in which the order which has been read by the Lord Chancellor proposed to provide for the costs, the costs provided for should be not only the costs of the action, but also of the Appeal, which would not follow without special words. The other point I should submit to your Lordships is one which has not been referred to in the argument on either side, but

MARGARET
CLEPHANE, ET AL.
v.
THE MAGISTRATES,
& C. OF
EDINBURGH.

which I may perhaps mention as one which your Lordships may think it right to give some attention to in an order that goes into so much detail. An Act of Parliament passed in the year 1860, called the Annuity Tax Abolition Act, made, in sections 56 and 57, certain provisions with regard to the city and town churches of Edinburgh, and it named as one of those Trinity College Church, and it transferred to the Commissioners under that Act such rights of administration and custody as were then vested in the Town Council and Corporation, with certain provisions as to pew rents. As I understand the order which has been suggested to your Lordships, the one fit to be made in this case, I am not aware that that order would actually conflict with any of those provisions; but your Lordships might think it proper that I should now mention the Act, in order that if your Lordships in your wisdom thought fit, some notice should be taken of it in your present order, with a view to prevent it appearing to conflict with the provisions of that Act of Parliament.

The LORD CHANCELLOR: My Lords, with regard to the last point which has been mentioned at the Bar, I would not advise your Lordships that it is either necessary to advert to it, that it would be proper to do so. Not necessary, because undoubtedly, whatever may be the provisions of that Act, it will be quite competent to the Court of Session, in carrying your Lordships' directions into effect, to take the provisions of that statute into consideration. But I should particularly object to mentioning that Act in the present order, because although we approve of this church, as the property of the charity, being used for the benefit of the district, yet I apprehend that your Lordships by no means mean to lay it down as law that this church when rebuilt will become a parish church.

My Lords, with regard to the other point, I must confess that I feel somewhat unwilling to go so far as to give to the Magistrates of Edinburgh the whole of the expenses of this litigation, because I cannot but think that a little more energy and diligence, and a little more candour in these proceedings would have prevented the great delay that has taken place. At the same time I am glad to say that the conduct of the Magistrates, in the argument of this Appeal, has been everything that could be desired by your Lordships; and if therefore your Lordships desire to give the Magistrates out of the charity fund the costs that they have been put to by reason of the proceedings in the suit of Forrester and others, I shall concur entirely in your Lordships' views upon that matter. I think it will be necessary that the order should be so expressed as to give to the Magistrates and to the Appellants in Clephane's suit, if your Lordships approve of it, the costs of the Appeal. I would therefore ask your Lordships to intimate your opinion whether you think that the expenses of the Magistrates in Clephane's suit should come out of the funds of the charity; and I hope your Lordships will approve of its being now distinctly stated that in the administration of this fund for all the objects of the trusts, the parties who are intrusted with the carrying out of these trusts are not to consider that the Court will be justified in allowing the costs of any proceedings except those which are conscientiously and properly directed to the just ends of administering this charity.

MARGARET
CLEPHANE, ET AL.
v.
THE MAGISTRATES,
& C. OF
EDINBURGH.

Lord CRANWORTH: My Lords, I concur with my noble and learned friend in all that he has said. In the first place, I certainly concur with him in a very deep regret at the expenditure of what I consider very unnecessary amount of costs in a matter that

MARGARET
CLEPHANE, ET AL.
v.
THE MAGISTRATES,
& C. OF
EDINBURGH.

might have been much more speedily and cheaply settled. But I confess I do not feel that the case is strong enough to require me to say that as trustees of this fund the Magistrates ought not to have their costs; and therefore I should concur in my noble and learned friend's proposal that they should have their costs out of the funds of the charity.

Lord CHELMSFORD: I entirely concur with my noble and learned friends.

Sir *Hugh Cairns*: With regard to the repayment of the costs paid to Forrester.

The LORD CHANCELLOR: That would follow as a matter of course. I will put it into the order. And in that part of the order which declares that the expenses properly incurred by the Pursuers and Defenders in the suit of Clephane and others ought to be paid out of the funds of the charity, I will insert the words "including the Appeal, and also the Defenders' costs in the other suit and Appeal." And in the suit of Forrester and others, I will make this addition to the order, "That any sums paid by the Defenders to the Pursuers under the Interlocutors hereby reversed be repaid by the Pursuers to the Defenders."

JUDGMENT IN THE FIRST CAUSE.

Ordered and Adjudged, That the said Interlocutors, so far as complained of in the said Appeal, be, and the same are hereby reversed: And it is *Declared*, That under the circumstances of the case, and having regard to the usage which has uniformly prevailed since the establishment of the charity in the proceedings mentioned, it is fit and proper that so much of the money received by the Defenders (Respondents) from the North British Railway Company as will be sufficient for the purpose, but not exceeding 7,000*l.*, should be applied in the purchase of a site and in building a church, which, after reserving full accommodation for all the inmates of the hospital in the said proceedings mentioned, and persons connected therewith, will afford to the inhabitants of the district in the said proceedings mentioned, as much

accommodation as was afforded by the collegiate church in the said proceedings mentioned, which has been removed: And it is further *Declared*, That such church ought to be built in connexion with the hospital (if the same shall be rebuilt under the scheme herein-after directed), or on a site as near thereto as can be conveniently obtained: And it is further *Declared*, That the duty of building such church belongs to the Defenders (Respondents) as trustees of the said charity, and that they will not be under any obligation to observe or follow the style or model of the old church in the said proceedings mentioned, in such new building: And it is further *Declared*, That such new church will be the property of the said charity, subject to its being used, and if so used, then to its being kept in repair and maintained in like manner as the said old church was before its removal: And it is further *Ordered*, That the Defenders (Respondents) do forthwith bring in and lodge with the Court of Session a minute, showing the site and plan of building of such new church; and the building is not to proceed until such plan and site have been approved of by the said Court: And it is further *Declared*, That all the residue of the money received from the said Railway Company, and all interest thereon, and all the rest of the property of the said hospital is applicable to the enlargement and maintenance of the said charity, as declared and established by the Charters dated respectively the 12th of November 1567 and the 26th of May 1587 in the said proceedings mentioned, according to a scheme to be settled for that purpose, including therein the rebuilding of the hospital if the same shall be deemed necessary: And it is further *Ordered*, That it be referred to the said Court of Session to settle and approve of such scheme accordingly, and to inquire and ascertain of what the property of the said hospital consists, and in what manner the money received from the said Railway Company has been invested by the said Defenders (Respondents), and when such investments were made, and what sums have been received for interest thereon, and by whom and how such sums have been applied: And it is also further *Declared*, That the expenses properly incurred by the Pursuers and Defenders in this cause in the Court below, and the costs properly incurred by the said Appellants and Respondents in this Appeal, ought to be paid out of the funds of the said charity: And it is therefore further *Ordered*, That the expenses so properly incurred by the said Pursuers and Defenders in this cause in the Court below, and the costs so properly incurred by the said Appellants and Respondents in the said Appeal, be duly taxed, and the amount of such taxed costs in the said cause in the Court below, and the amount, certified by the Clerk of the Parliaments, of such costs of the said Appeal, be paid out of such parts of the funds of the said charity as the said Court of Session shall deem most fit to be applied for that purpose: And it is also further *Ordered*, That the cause be,

MARGARET
CLEPHANE, ET AL.
v.
THE MAGISTRATES,
&C. OF
EDINBURGH.

MARGARET
CLEPHANE, ET AL.
v.
THE MAGISTRATES,
&C. OF
EDINBURGH.

and is hereby remitted back to the Court of Session in Scotland, to do therein as shall be just and consistent with these declarations and directions, and this Judgment.

JUDGMENT IN THE SECOND CAUSE.

Ordered and Adjudged, That the said Interlocutors, so far as complained of in the said Appeal, be, and the same are hereby reversed, and that the Defenders (Appellants) be assoilzied from the conclusions of the summons in the proceedings mentioned: And it is *Declared*, That the expenses properly incurred by the said Defenders in this cause in the Court below, and the costs properly incurred by the said Appellants in this Appeal, ought to be paid out of the funds of the charity, in the said proceedings mentioned: And it is therefore further *Ordered*, That the expenses so properly incurred by the said Defenders in this cause in the Court below, and the costs so properly incurred by the said Appellants in the said Appeal, be duly taxed, and the amount of such taxed costs in the said cause in the Court below, and the amount certified by the Clerk of the Parliaments, of such costs of the said Appeal, be paid out of such parts of the funds of the said charity as the said Court of Session shall deem most fit to be applied for that purpose: And it is further *Ordered*, That any sum paid by the said Defenders to the Pursuers in the said suit, under the said Interlocutors hereby reversed, be repaid by the said Pursuers to the said Defenders: And it is also further *Ordered*, That the cause be, and is hereby remitted back to the Court of Session in Scotland, to do therein as shall be just and consistent with this declaration and these directions, and this Judgment.

DEANS & STEIN—LOCH & M'LAURIN—MAITLAND &
GRAHAM.