No 1. acts 1633, because they were particularly excepted from the general act of annexation 1587. 2*do*, In the general revocation, act 9th, Parl. 1633, in all the submissions, surrenders and decreets-arbitral that followed upon it, the infeftments in favours of hospitals were still excepted; therefore the acts of Parliament which ensued upon the King's revocation could not be presumed encroachments upon the Hospital's right. 3*tio*, It was contended for the Hospitla, That even the words of the statute did not comprehend their case, such kirk-lands only being annexed which had been erected into temporal lordships, baronies, or livings, under none of which the grant in their favours could come; because by the act 121, Parl. 1592, 'all ratifications in Parliament of erections of kirk-'lands into temporal lordships or livings are discharged;' yet, in that same Parliament, and of that same date, the mortification to the Hospital of Perth was ratified.

It was *replied* for the defender; That the exception of the Hospital's right from the general act 1587 could have no influence upon its being excepted from the annexation. The rights of a great many other persons were excepted expressly, as well as the Hospital's, who yet never pretended that their vassals were in a different case from the vassals of other lords of erection, and that because of the generality of the words of the law, 'all erections made, whether 'before or after the said annexation in the year 1587.' 2*do*, The pursuers could not found upon that clause of King Charles I.'s revocation, which excepts the infeftments in favours of hospitals, without acknowledging that their right was an erection into a temporal living; for, by a subsequent article in that revocation, 'all infeftments of whatsoever abbacy, priory, &c. if not erected in-'to a temporal barony, lordship, or living, to and in favours of whatsoever per-'son or persons, are revoked;' which must comprehend the superiority in favours of the Hospital, unless they admit themselves to have right to them as a temporal living, and consequently fall under the words of the annexation 1633.

The Lords found mortifications in favours of hospitals were not comprehended under any of the acts of annexation.

Reporter, *Lord Dun.* Act. *Ro. Craigie.* Alt. *Ch. Areskine.* Clerk, *Hall.*
Fol. Dic. v. 3. *p.* 277. *Edgar, p.* 29.

1765. *August* 9.

The Merchant Company and Trades of Edinburgh *against* The Magistrates, &c. Governors of Herriot's Hospital.

No 2.
Governors of a hospital have power to feu out the hospital's lands.

This hospital was endowed by George Herriot, for the maintenance and education 'of poor fatherless boys, the sons of burgesses and freemen of the city 'of Edinburgh.' The Magistrates, Ministers, and Council of the city, were ap-

pointed, 'feoffees of trust,' and 'ordained, as feoffees, to be governors of the 'lands, possessions, revenues, and goods of the said hospital.' The funds were directed to be employed 'towards purchasing certain lands in perpetuity, to be-'long unto the hospital.' No 2.

Lands were accordingly purchased at different times, the conveyances taken to the governors, as 'feoffees in trust in perpetuity,' for behoof of the hospital.

Several small parcels of the hospital lands had been feued out by the governors, both to individuals and the town of Edinburgh, under different conditions. In 1759, the town, in the view of forming a communication with the fields on the north side of the town, by a bridge over the North Loch, obtained a feu of 37 acres of the hospital lands. The feu-duty was 5 bolls of barley; and, by the feu-contract, it was referred to certain persons, what proportion of the profits that might arise to the city of Edinburgh, by means of this feu, should be paid annually to the hospital?

This measure having appeared disadvantageous to the hospital, the Merchant Company, and Incorporations of the city, brought a process against the Governors, concluding *inter alia*, to have it found that the Governors had no power to feu the hospital lands, or, if they had such power, that it should be put under such limitations as might prevent its being exercised to the prejudice of the hospital.

The defenders *objected* to the title of the pursuers, upon the following grounds. 1*mo*, It is an established rule in law, That no person is entitled to found, either directly in an action, or by way of defence, upon any right that does not properly belong to himself, but to some third party. In the present case, the whole funds belonging to the hospital are, by the express deed of the founder, devised to the Magistrates and Ministers of the city as administrators. They are vested with every right, and entitled to insist in every action competent to the hospital. If the former administrators have transgressed their powers, and squandered or misapplied the funds of the hospital, so it is only the present administrators of the hospital who may call the former ones to account; as appears to have been done, in a similar case, 22d November 1698, Magistrates of Edinburgh *contra* Binning, *voce* MORTIFICATION.

2*do*, No person is obliged to answer as defender in any action, unless his obtaining an absolvitor therein will give him the benefit of a *res judicata*, and effectually cover him from any future challenge upon the same grounds. But, as every private burgess has an equal right and interest to insist in the present action with the pursuers, if it should be found that these have a title, it will be impossible for the Governors to be secure with regard to any act of administration, till they have stood a process at the instance of every one discontented burgess in Edinburgh.

Answered for the pursuers; As the mortification is for the behoof of the children of burgesses and freemen of the city, the pursuers, whose families are to

No 2. reap the benefit of it, have a manifest interest to take care, that the administrators do not either abuse or exceed their powers. The present administrators may have a right to sue for redress of wrongs done to the hospital by former administrators, but who are to call the present ones themselves to account? The former ones lose the character of governors with their office, and sink into that of simple burgesses. The hospital-boys are pupils, when admitted and dismissed before majority. The power given to bishops and ordinaries, by the former law, is at an end by the abolition of episcopacy. To say, that the present administrators have the sole right to call themselves to account, or declare their own powers, is absurd, The pursuers, therefore, as they have an evident interest, so they seem to be the only persons who can insist in this action.

The objection, That a decree *absolvitor* could not give a *res judicata* to the defenders, is not conclusive. That inconveniency attends all popular actions, which however are known in the law of Scotland. Thus, every burgess may call the magistrates of his borough to account for their administration of the common good; Johnston *contra* Magistrates of Edinburgh, 1735, mentioned in the case Anderson *contra* Magistrates of Renfrew, 30th June 1752, No 33. p. 2539.; though in such cases the same objection might be made.

'THE LORDS sustained the pursuers title to carry on this process.'

II. *Question*, Whether the Governors have power to feu out the hospital-lands?

Argued for the pursuers; The defenders not being proprietors, but only feoffees in trust, or administrators of the hospital's funds, cannot alienate or let in feu-farm, which is undoubtedly a species of alienation. The hospital-boys, being always either pupils or minors, the powers of the Governors are such as belong to tutors and curators. Such was the idea both of the Roman and Canon law; *L.* 32. *C. de Episc. et Cler. Voet ad Pand. tit de reb. eorum qui sub tutela, &c.* § 17. *Lancilottus Instit. juris Canonici, L.* 2. *tit.* 23. § 4.

2*do* By the express will of the founder, the money bestowed by him was directed to be employed, 'for and towards purchasing lands in perpetuity, to be-' long to the hospital,' and 'the yearly value of the lands so purchased,' is appropriated for the maintenance of the boys; which evidently imports a prohibition to alienate the lands.

3*tio*, If the Governors may let in feu-farm, and thereby convert the lands into feu-duties, they may also convert the feu-duties into a sum of money; and of what dangerous consequence this might be to the funds of the hospital, is obvious. In fact, some of the feuers have, by their contracts, an option to purchase part of their feu-duty at a certain rate.

Answered for the defenders; It is an established maxim, That land-property must exist somewhere, nor is the case of communities any exception. The Magistrates and other administrators are the representatives of the community, and their deeds being considered as the deeds of the whole body, must have the same effect in law with those of any ordinary proprietor. As to the present case, the defenders stand infeft in the lands in question, upon the most solemn

title of property known in our law, a charter of resignation under the Great Seal, followed by infeftment, and confirmed by a Scotch Act of Parliament. If these titles were not sufficient to vest in them the feudal right and property, it would follow, that the lands have been in non-entry since the resignation upon which the charter proceeded. No 2.

If the property be vested in the defenders, they must have power to feu the lands of consequence, unless they are restrained by the express will of the founder, or by the nature of their office, as being feoffees in trust for behoof of the hospital.

As to the will of the founder, the only thing insisted on by the pursuers is that where he ordains the lands to be purchased in perpetuity to belong to the hospital; but this phrase, which is usual in deeds conceived in the English form, as Herriot's was, does not import that the lands should be unalienably annexed to the hospital. It answers precisely to our common clause of style, heritably and irredeemably, or *in perpetuam remanentiam*, and denotes a perpetual, in opposition to a temporary or a redeemable right.

Though the defenders are feoffees in trust for behoof of the hospital, it does not thence follow, that they may not feu the lands. On the contrary, the universal custom and opinion of the whole nation stands the other way. Magistrates of boroughs, masters of colleges, and the administrators of all public societies, are precisely in the same situation. Yet they have been in the constant practice of granting feus, and those feus have been universally acquiesced in. The King holds the crown-lands only as administrator for behoof of the Crown; yet, before the act of annexation in the reign of James II. there was no doubt, that he might grant feus of any part of these lands. But, what approaches the nearest to the present case, is that of the church-lands before the reformation, which were vested in the dignified ecclesiastics, only as administrators for their respective benefices.

The defenders must indeed act for the benefit of the hospital; but no act of administration can be more beneficial than this of feuing out the lands. The revenue of the hospital is augmented from three, the former rent, to 5 bolls an acre, besides a claim to part of the profits that may be afterwards reaped by the town. The revenue is likewise better secured by the advanced value of the subject. Indeed, this seems to be the only way the advantage belonging to the lands, from their vicinity to the city of Edinburgh, can be realized by the hospital.

Replied for the pursuers; The argument from the case of the magistrates of boroughs, &c. does not apply. All these are, in the eye of law, corporations, and, as such, may have very considerable and extensive powers; but Herriot's hospital is no corporation.

Duplied for the defenders; It is apprehended, that the defenders' titles above-mentioned, are a virtual creation of them into a community, to the effect at least of enjoying these lands; and, in fact, they have acted as a community for more than a hundred years past, without challenge.

No 2. 'THE LORDS found, that the Governors have power to feu out the lands belonging to the hospital.'

III. *Question*, Whether the Court of Session have power to establish rules to be observed by the Governors in granting feus? And, Whether these feus can only be granted *causa cognita*, and by authority of the Court?

Herriot, having by his will given power to Walter Balcanqual, Dean of Rochester, to establish statutes for the administration of the hospital, he ordained, 'That the Chancellor, the two Archbishops, the Lord President of the College 'of Justice, the Lord Advocate to his Majesty of this realm of Scotland, for 'the time being, shall have full and whole power to interpret the same, and to 'determine all controversies arising about the interpretation of the same: So 'that whatsoever any three of these five met together, and all parties interest-'ed being convened, shall judicially or extrajudicially declare, in their con-'sciences, to come nearest the true meaning of these statutes, that, and no-'thing but that, shall be taken for the true meaning of the same, and, in all 'points without further scruple, be observed and followed.'

The pursuers *argued*, That, by this statute, a power was given to these great officers to controul the Governors; and that, as a quorum of them did not now exist, the powers originally given to them belonged to this Court, as being a court of equity, and vested with the same powers as the Roman Praetor and Chancellor of England.

They likewise *argued*, That, as the Governors could only be considered in the light of tutors, so, at common law, they could not alienate, *nisi auctoritate judicis*.

Answered for the defenders; *1mo*, By the statute quoted, no more was meant to be given to the officers therein mentioned, than a power to interpret the statutes, in case any doubt should arise as to their meaning. *2do*, Whatever were their powers, the Court would not because of a failure of a quorum, assume those powers to themselves, but authorise the remaining nominees to act as a quorum might have done, as in Campbell *contra* Lord Monzie, 26th July 1752, *voce* JURISDICTION. But, *3tio*, The equitable powers of the Court are, from their nature, confined to cases of necessity. The present is none of these. There is no defect in the deed of mortification. The will of Herriot therein contained is complete, and clearly expressed. It has been, and may still be carried into execution, without the intervention of any court whatever. The argument from the case of tutors does not apply. The defenders are proprietors of the lands in question. Tutors are not proprietors; and, therefore, must of necessity have the authority of the Court before they can alienate.

'THE LORDS assoilzied the defenders from this conclusion of the libel. *See* JURISDICTION. TITLE TO PURSUE.

Act. *Sir D. Dalrymple*, et *alii*. Alt. *Blair*, et *alii*. Clerk, *Rose*.

Fol. Dic. v. 3. *p.* 276. *Fac. Col. No* 27. *p.* 46.