

Friday, February 25.

OUTER HOUSE.

BALLANTINE AND PATERSON v. THE MERCHANT COMPANY OF EDINBURGH AND OTHERS.

(Before LORD ORMDALE.)

Trust—Hospital—Mortification—Sale. A conveyed certain funds to trustees, which he mortified and designated "as a fund whereby to raise a new Hospital for entertaining and educating of the male children and grandchildren of decayed merchants in Edinburgh, which Hospital is to be called in all succeeding generations, George Watson's Hospital." He gave powers to his trustees to enact, from time to time, statutes or rules for the management of the Hospital. The Hospital was built in 1740. Statutes and rules were made from time to time, and were repeatedly "revised, amended and improved," and the Hospital house, whole stock, and revenue thereof, became unalterably vested in the Merchant Company of Edinburgh, for whose behoof the mortification was chiefly designed. The Company were empowered and required to take all proper care that the statutes of the Hospital should be duly observed. *Held (per Lord Ormdale and acquiesced in)*—(1) That the constitution of the trust did not exclude a sale of the Hospital by the Governors if they should think that step expedient; (2) that such a sale was not excluded by the provisions of the statutes or rules enacted and in force for the management of the Hospital.

Circumstances in which held that the proposed sale of the Hospital by the Governors was not prejudicial to the interests under their charge.

This is an action at the instance of James Ballantine of Warrender Lodge, Edinburgh, and Robert Paterson, architect, and valuator of the city of Edinburgh, both members of the Company of Merchants of the city of Edinburgh, the said Robert Paterson being also a governor of George Watson's Hospital; against the Company of Merchants of the city of Edinburgh, incorporated by Royal Charter and Act of Parliament; the governors for the time being of George Watson's Hospital; Alexander Craig, treasurer of the said Hospital; and Thomas Strong, W.S., and Alexander Kirk Mackie, S.S.C., Edinburgh, joint clerks of the said Merchant Company and of the said Hospital; and also against the Royal Infirmary of Edinburgh, incorporated by Royal Charter, for any interest the said incorporation may have in the premises; and against the Managers of the said Infirmary, for any interest they may have in the premises; and against Andrew Wood, M.D., Edinburgh, Thomas Field of Hawkhill, Lochend Road, deacon-convenor of the Trades of Edinburgh, and John Weir, Edinburgh, manager of the said Royal Infirmary, for any interest they, as individuals, or as an alleged committee of managers, may have in the premises. In their prayer to the note of suspension and interdict the complainers crave the Court to "suspend the proceedings complained of, and to interdict, prohibit, and discharge the said respondents, the Company of Merchants of the city of Edinburgh, and the Governors of George Watson's Hospital, and their officers afore-

said, from selling, alienating, or disposing of the Hospital house called or known as George Watson's Hospital, and the ground attached thereto; and from acting on or attempting to carry into effect any agreement or resolution to sell or alienate the said Hospital or grounds; and, specially, from acting upon or attempting to carry into effect a resolution of the Governors of said Hospital dated 31st August 1869, and a resolution of the said Company of Merchants dated 9th September 1869, and a resolution of the said Company dated 14th October 1869, or any of them; and from applying the moneys or profits of the said Hospital in carrying out the said resolutions, or any remit or instructions therein contained; or to do otherwise as to your Lordships may seem proper."

In their Revised Statement of Facts the complainers set forth at considerable length the terms of George Watson's deed of mortification, and the terms of a codicil annexed thereto. Certain statutes and rules, and a declaration relative thereto, executed by the trustees of George Watson in the year 1724, before the Hospital had been erected, are then referred to. The material parts of these are embodied in the annexed interlocutor of the Lord Ordinary. The complainers then allege:—"According to the said rules and statutes of 1724, one of the fundamental articles of the Hospital was the first, 'concerning the name of the Hospital and fund out of which the house is to be built;' and the said article enacted that the house should be erected, builded, and furnished out of the annual rents and profits of the sum of £12,000 sterling money, mortified for the use of the said Hospital, upon a piece of ground or area called Thomson's Yards, besouth the Lady Yester's Church, lately purchased for that purpose. In 1736, however, before the building of the Hospital was begun, a proposal was made by the governors to the trustees, that the Hospital should be built upon a part of the ground called Heriot's Croft, where it at present stands, and that the ground at Thomson's Yard should be sold to the Infirmary, which was then being instituted. The trustees at first objected to the proposal. Ultimately, however, and after considering a memorial for the governors, bearing that a committee had been appointed to confer with the trustees 'with respect to changing the situation of the Hospital, which can only be done with consent of the two surviving trustees,' and setting forth the objections stated by the trustees, and the committee's answers thereto, the trustees became satisfied that the ground at Heriot's Croft would be a more proper situation for such an hospital. The minutes of the trustees and governors' meeting on the subject (which is produced and referred to) accordingly bears: 'Therefore the said trustees and governors have consented and agreed, and hereby unanimously consent and agree to the foresaid alteration, and are of opinion that the contract of feu of the foresaid part of Heriot's Croft should be execute with all convenient diligence. And the same being done, enact and ordain that the foresaid Hospital be situate, erected, and built upon that part of Heriot's Croft intended to be feued for that purpose as aforesaid; and the said trustees hereby agree to alter and change the first chapter of the statutes of the said Hospital, appointing the house to be built upon the said piece of ground or area called Thomson's Yards, besouth Lady Yester's Church, within the city of Edinburgh, in so far as the same concerns the situation of the Hospital, and

promise to concur in a transmission of Thomson's Yards to the Royal Infirmary, and that so soon as the purchase of the Hospital's part of Heriot's Croft is settled and finished."

After narrating that in 1740 the Hospital was built on Heriot's Croft, and that the then surviving trustees revised the statutes of 1724, and appended a declaration dated 17th March 1740, the complainers set forth—"By a postscript annexed to the last mentioned declaration, dated 17th April 1755, the said Charles Binning and John Osburn, as trustees foresaid, on the narrative therein contained, declared that the said statutes were compiled by them agreeably to the intention of the founder and the powers they had from him; and they, with consent of the three ministers before named, appointed the same to be strictly kept and observed in every particular. The said postscript bears, *inter alia*, that 'as the Hospital house, whole stock, and revenue thereof are unalterably vested in the Merchant Company of Edinburgh,' the trustees empowered and required the Company to take all proper care that the statutes of the Hospital be duly observed. The postscript is declared to have equal authority with the statutes, and to form part thereof. It is appended to the statutes, No. 22 of process, and is here referred to, and held as repeated. The said postscript was also delivered to the Merchant Company and Governors, and is acknowledged by them in their minutes; and on 1st September 1755, at a general meeting of the Merchant Company, the master and assistants were appointed to wait on the trustees, and to thank them for their pains in amending and improving the statutes, and to assure the trustees that the Company were resolved to take care, by all proper means, to cause the statutes to be punctually observed."

The complainers then go on to trace the history of the Institution since 1755, and, coming down to the proceedings in which the present action has directly originated, narrate the history of the movement for the rebuilding of the medical Hospital of the Infirmary upon a different site. They then say, "In or about the months of October and November 1868 an agitation was commenced for a change in the site of the Infirmary to George Watson's Hospital grounds, and for rebuilding the surgical as well as the Medical Hospital. This agitation resulted in a resolution being passed by a majority of a meeting of the Royal Infirmary Court of Contributors, composed to a considerable extent of members of the Merchant Company, to the effect that the new Infirmary should afford accommodation for surgical as well as medical patients, and should be built on the grounds of the said George Watson's Hospital. The said resolution was brought about in great measure by members of the Merchant Company, interested in promoting the views above mentioned, concerning the suppression or alteration of George Watson's Hospital. It was illegal and incompetent on the part of the Court of Contributors, after the proceedings above mentioned, to pass any such resolution or resolutions. The passing of such resolution or resolutions involved a direct breach of faith towards those from whom subscriptions had been obtained on the footing and for the purpose specified in the original resolution of the said Court of Contributors, and in the resolutions of the public meeting following thereupon."

After quoting the offer made by the managers of the Infirmary for the purchase of the Hospital

from the Governors, and the acceptance by the latter thereof, on the motion of Mr William Johnston, seconded by Mr Thomas Knox, the complainers allege "The said motion referred to a matter of very serious consequence; but no notice of it, or of any motion to that effect, was given at any previous meeting. On the 9th September 1869 the foresaid resolution was brought before a general meeting of the said Company of Merchants for their approval, as if it was a mere resolution in the ordinary course of administration and management for the sale of lands purchased by way of investment; and at the said meeting of the Merchant Company a resolution was passed by the narrow majority of forty-eight to forty-five votes, and against the remonstrances and protest of the complainers and other members of the Company, to the effect that the sale of George Watson's Hospital and grounds and house in Wharton Lane to the Royal Infirmary be approved of, subject to any further conditions the Governors may think fit to stipulate for. One protest against this resolution was by the complainers, and was signed and adhered to by forty-five members, and another protest was signed and adhered to by nineteen members out of the two hundred and ninety members of the Merchant Company. On October 14, 1869, another meeting of the said Company of Merchants was held, at which the subject was again brought forward, and the following resolution was, upon the motion of the mover of the previous resolution of 9th September—viz., Mr James S. Duncan, bootmaker, passed by a majority:—"That the Company having resumed consideration of the sale to the Royal Infirmary of George Watson's Hospital and grounds at Lauriston, and house in Wharton Lane, and considering that the Governors, by their minute, have agreed to build another Hospital, and a large day educational institution, and that they will thus be enabled to increase the benefits to the sons and grandsons of members of the Company, and avail themselves fully of the powers to be obtained under the Endowed Hospitals Act, therefore the Company of new approve and ratify the said sale at the price and on the conditions stipulated for by the Governors, and, as recommended by the governors, remit to them to take professional advice, architectural and educational, as to a new Hospital and Institution, and to report to the Company; and further, that the Company remit to a committee of the members, including some of the old masters and old treasurers, to co-operate with the said Governors in this matter."

The complainers finally state that these resolutions were illegal, and would be prejudicial to the interests of the Hospital.

Answers to the note of suspension were put in by the Merchant Company, and Governors of George Watson's Hospital, and for the Royal Infirmary. The Merchant Company and Governors also set forth the history of the institution, and of its successive statutes and rules; and in regard to the resolutions brought under suspension they make the following explanations:—"The Governors are satisfied that the sale is eminently beneficial to the trust-estate and the objects of the charity. The property sold had been valued by Alexander Scott of Craiglockhart in November 1861 at £26,130; and, with the value of plenishing, stands in the Governor's books valued at present at £27,193. This sale was the more satisfac-

tory, in respect that many of the Governors were of opinion that the Hospital was not a convenient and suitable one for the boys, owing to its peculiar construction; and, in agreeing to the sale, they had in view the obtaining of a more commodious and modern building. The complainers' averment that the above-mentioned valuation was put upon the subjects as being 'unsuitable and not remunerative, but held unalterably for the charitable purposes of George Watson's trust,' is denied. The valuation of the late Alexander Scott expressly bears that he valued the property as feuing ground at £90 per acre. With the view of bringing the sale before the Company for their approval, in terms of the statutes, a full memorial was prepared, which was submitted to a general meeting of the Company on 9th September 1869, specially called for the purpose. At that meeting a motion approving of the sale was carried by a small majority; and the sale was thus approved by the Company in terms of the statutes. The resolution so agreed to was in these words:—'That the Company approve of the sale to the Royal Infirmary of George Watson's Hospital and grounds at Lauriston, and house in Wharton Lane, subject to any further conditions the Governors may think proper to stipulate for.' At the meeting Mr James Ballantine dissented from the above-mentioned resolution, for reasons which were afterwards given in. These reasons and protest are produced herewith. On 4th October 1869 the master, assistants, and treasurer had a meeting to consider further as to the sale; and, with the view of securing unanimity in the Company, they resolved to recommend to the Governors that the sale should be submitted again to the Company. The Governors, at their meeting on 4th October 1869, considered this recommendation, and agreed 'that the consideration of the sale' should be submitted to another meeting of the Company for their approval. Mr Robert Paterson moved two amendments at this meeting, both of which were defeated; but in neither of them did he indicate any doubt of the power of the Governors to sell, and one of them referred to a new site. An impression having gone abroad that the Governors had no intention of erecting another building, it was at same meeting moved by Mr James Falshaw, 'That in the event of the sale of the Hospital being carried, another Hospital and a large day educational institution be built; and that it be recommended to the Merchant Company to remit to the Governors to take professional advice—architectural and educational—and to submit the resolutions to be arrived at to the Merchant Company for their consideration.' It was moved by Mr Paterson, as an amendment of Mr Falshaw's motion, 'That as the proposals as to the substitute Hospital and day educational institute indicated by the motion are indefinite as to sites and expenditure, it be remitted to a committee to take such advice as may be necessary, and estimates of expense, before the question is again submitted to the Merchant Company.' In terms of the Governors' resolution, another meeting of the Company was held on 14th October 1869, and the sale was again, on the motion of Mr James S. Duncan, ex-master, confirmed, but this time by a large majority. So satisfied did the meeting appear with the result of the division that no one intimated any dissent. Mr Paterson and Mr Ballantine were present. This second ratification of the sale was duly intimated to the managers of the Royal Infirmary."

The complainers, *inter alia*, plead:—

"The Hospital-house being vested in the Merchant Company as trustees for the ends and purposes specified in George Watson's Trust, and in the statutes composed and adjusted by his trustees in terms of his directions, the proposed sale thereof is *ultra vires* of the Governors of the Hospital and of the Merchant Company, and is illegal.

"In respect that the fundamental statutes of the Hospital, composed and adjusted by George Watson's trustees, require that the right of the said Hospital-house should be in, and always remain with, the said Company of Merchants, for the ends and purposes therein mentioned; and that, under the trust of George Watson and relative statutes and declarations, neither the Governors nor the Merchant Company have any power to sell the said Hospital-house or ground attached thereto, and on which the same is situated; the resolutions complained of were illegal, and the said Governors and Company ought to be interdicted as craved.

"In respect that, under the trust of George Watson, and the fundamental statutes adjusted as aforesaid, the purpose of the Hospital is the relief, maintenance, and instruction within the said Hospital of the poor children therein described, and no part of the stock and profits of the Hospital are applicable otherwise than for behoof of the said Hospital, it was and is beyond the powers of the Governors and of the said Merchant Company to resolve upon the proposed sale with a view to the erection of a large day educational institution in another locality, or to the application of the funds of the Hospital to such a purpose.

"The resolution of 14th October was illegal and *ultra vires* of the Company, not merely in respect that the act resolved upon was beyond the powers of the Company, but also as proceeding upon an illegal consideration, viz., the alleged agreement of the Governors to build another Hospital, and a large day educational institution, which was *ultra vires* of the said Governors under the statutes of the Hospital."

The respondents maintain both that the Governors of the Hospital have the power to make the sale, and that it would be expedient that it should be carried through.

LORD ADVOCATE, SOLICITOR-GENERAL, and LEE, for the suspenders.

DEAN OF FACULTY, WATSON, and BALFOUR, for the Merchant Company and the Governors of Watson's Hospital.

MUIRHEAD for the Royal Infirmary.

The Lord Ordinary has pronounced the following interlocutor in which parties have acquiesced.

"*Edinburgh, February 25, 1870.*—The Lord Ordinary having heard counsel for the parties, and considered the argument and proceedings: Repels the reasons of suspension, refuses the interdict, and decerns: Finds the respondents entitled to expenses, allows them respectively to lodge accounts thereof; and remits the same when lodged to the auditor to tax and report."

"*Note.*—It is of importance, in reference to some views of this case, to observe the absolute and unqualified terms in which the prayer of the note of suspension and interdict is expressed. The complainers ask the Court to interdict, prohibit, and discharge the respondents from selling or disposing of George Watson's Hospital house and grounds; 'and from acting on or attempting to carry into effect any agreement or resolution to

sell or alienate the said Hospital or grounds; and especially from acting on or carrying out three resolutions, dated respectively in August, September, and October last, the first by the Governors of the Hospital, and the other two by the Merchant Company, having a sale of the Hospital for their object. The resolutions referred to are set out in the printed papers; and, in connection with them, the explanations given by the respondents in articles 14, 15, and 16 of their Statements of Facts, are deserving of attention. It will be noticed that, after the Merchant Company had, at their meeting held on the 9th September last, passed a resolution, being the second referred to in the prayer of the note of suspension and interdict, the Governors, on the 4th October, agreed that 'the consideration of the sale' should be submitted to another meeting of the Merchant Company for their approval, and they, the Governors, at the same time resolved, 'that in the event of the sale of the Hospital being carried, another hospital and a large day educational institution be built; and that it be recommended to the Merchant Company to remit to the Governors to take professional advice—architectural and educational—and to submit the resolutions to be arrived at to the Merchant Company for their consideration.' It was in this position of matters that the Merchant Company again, for the second time, passed a resolution—being the third referred to in the prayer of the note of suspension and interdict—approving of the proposed sale. Whether, therefore, the respondents could legally sell the Hospital or not in the manner proposed by them, there seems to be no room for the suggestion that their resolution to do so was come to without full and deliberate consideration, or in reckless disregard of the future wants of the Institution.

Independently, however, of this consideration, it was maintained by the complainers, in support of their note of suspension and interdict—1st, That, having regard to the trust-deed or will of George Watson, the founder of the Hospital, and the rules or statutes subsequently settled for its management, and which it was represented must be held to form part of its constitution, it was *ultra vires* of the respondents, the Governors and Merchant Company, to sell or dispose of the Hospital as proposed by them; 2dly, That, even supposing it had been within their power to sell or dispose of the Hospital, the resolutions passed for that purpose now complained of were formerly invalid and ineffectual, in respect that they had not been preceded by notice, as required by a bye-law of the Governors, which will be afterwards more particularly adverted to; and 3dly, That at any rate the complainers are entitled to ask for the interposition of the Court to prevent the resolutions referred to being acted on or carried out, in respect that a sale of the Hospital as thereby proposed would, in the circumstances, be injurious to the interests of the Hospital, and an abuse of any power possessed by the respondents. On all of these points a very full and able argument was addressed to the Lord Ordinary; and he has now to explain the grounds on which he has arrived at the conclusion that no sufficient case has been made out on the part of the complainers in support of their application.

"No objection could well be taken by the respondents to the title and interest of the complainers, although they are only two individuals out of numerous bodies. Nor was it suggested by

either party that there ought to be a proof or other investigation on any point. They concurred in asking judgment on the case as it stood.

"In regard to the question of power;—the nature and terms of George Watson's will, consisting of a trust-disposition and codicil, both dated in 1723, deserve the first attention. Now, it will be observed that the founder of the Hospital, George Watson, did not by that deed leave or mortify Heriot's Croft, the ground on which the Hospital is situated, for that or any other purpose. On the contrary, he directed his whole lands and estate to be sold and converted into money; and, after providing for payment of his debts and numerous bequests, he burdened his estate with £12,000, which he mortgaged and designated "as a fund whereby to raise a new Hospital for entertaining and educating of the male children and grandchildren of decayed merchants in Edinburgh, which Hospital is to be called in all succeeding generations George Watson's Hospital." It may be inferred from this that George Watson intended, although he does not expressly state so, that ground should be purchased whereon to build an Hospital house; but assuredly nowhere does he enjoin that the identical ground so to be purchased, and the identical Hospital house so to be built thereon, should be held as mortgaged and retained for ever unchanged and inalienable. Nor is there anything in George Watson's trust-deed or codicil to the effect that the ground to be purchased should be of any particular description or extent, or in any particular situation, or that the Hospital house to be built thereon should be of any particular form of structure or order of architecture. It would, indeed, be unjust to the memory of George Watson to suppose that the great object of his bounty was other than the education and maintenance of children and grandchildren of decayed merchants in Edinburgh, or that he had any desire that such his object should be subordinated to, and far less frustrated by, considerations connected with the mere building in which it might for the time be in actual operation, or the ground on which that building might happen to be erected.

"But although George Watson did not lay any injunction on his trustees, or those who might be engaged in carrying his will into execution, as to the ground or building which was to compose the physical and outward form of the Hospital which it was his object to found, he did not omit making provision for the proper management of the Institution itself. He empowered his trustees, with the advice of three of the ministers of Edinburgh, 'to compose and adjust the rules of the said foundations as they shall see cause, but as near to the rules of the foundation and management of Heriot's Hospital and the Merchant Maiden Hospital as the nature of the thing will allow of, but with such corrections, alterations, and amendments as my said trustees, with consent foresaid, shall think fit to add or alter.'

"Statutes or rules were accordingly enacted at various times for the management of the Hospital, the terms of which require attention, as both parties appealed to them in support of their respective views. The first set of statutes or rules was enacted in 1724. No. 1 bears to be concerning the name of the Hospital and fund out of which the house is to be built. Here at once appears, what might be expected, a clear distinction between the expression 'Hospital,' as designative of the whole foundation and its objects, and the house as one of the means or instruments by

which these objects were to be carried out into practical effect; and this distinction, which is not unimportant to the present discussion in various of its aspects, pervades not only the statutes and rules of 1724, but others which were subsequently enacted. After declaring that the Hospital shall in all time coming be called 'George Watson's Hospital,' for 'educating and maintaining the children and grandchildren of decayed merchants in Edinburgh, or the indigent male children or grandchildren of the ministers of the Gospel that have been or shall be ministers of the old church of the said city,' No. 1 of the statutes or rules of 1724 provides—'That the said Hospital, whole stock and revenue thereof, shall be in, and always remain with, the Company of Merchants of the city of Edinburgh, under their administration, and for executing the ends and purposes after mentioned, in the manner and conform to the rules hereinafter recited.' It was argued on the part of the complainers that, according to the terms of this statute or rule, as just quoted, the identical building or hospital house now existing must remain and be retained for ever; but the Lord Ordinary cannot accede to this view. In point of fact, neither the existing nor any other hospital house had been then erected; and, accordingly, the statute or rule goes on to provide that it should be built on 'that piece of ground or area called Thomson's Yards, beneath Lady Yester's Church, within the city of Edinburgh, lately purchased for that purpose.' Neither is there any reason to suppose that by the statute or rule in question it was intended to be enacted that the hospital house, not then built but to be built on Thomson's Yards, was to remain and be retained in perpetuity; for no hospital house was ever built on Thomson's Yards, that ground having been disposed of by George Watson's trustees to the managers of the Royal Infirmary, and the building of that institution was erected thereon. For these reasons, and, indeed, from the very terms of the statute or rule in question, the Lord Ordinary is satisfied that it never was thereby intended to be enacted that the Hospital house erected or to be erected, whether in Thomson's Yards or in some other place, should there remain and be there retained in perpetuity. The object of the statute or rule appears to the Lord Ordinary rather to have been, as its words indeed bear, that the 'right' to the Hospital, 'whole stock and revenue thereof,' should remain with and under the administration of the Company of Merchants of Edinburgh. The word 'Hospital,' as here used, could not refer to the house alone, for there could be no 'stock or revenue thereof.' The meaning and effect of the statute was merely that the right to the house, as well as the stock and revenue of the Hospital, wherever and whatever these might for the time be, and however much they might vary and change, should continue vested in and under the administration of the Merchant Company.

"The other statutes or rules of the set of 1824 need not be specially noticed, as they do not materially bear on the present controversy. But there is annexed to these statutes or rules what is titled a 'Declaration containing the fundamental and unalterable Rules of the Hospital, but reserving power to alter and amend the rest of the statutes.' And in this 'declaration,' no more than in the 'statutes or rules' themselves, can the Lord Ordinary discover anything to the effect that the particular Hospital house and ground in question must

remain for ever inalienable. On the contrary, he finds in the 'declaration' an express reservation by the trustees to themselves of power to alter the statutes as they should see cause; and after the decease of any two of them, the same power of alteration is given to the Merchant Company, to be exercised by them in the way therein specified—'the said alterations in no way infringing upon the fundamental articles of the Hospital;' and then are specially enumerated what are to be held as fundamental articles, the only one of which that can be said to bear on the present dispute is that which declares that the right to the Hospital, its stock and revenue, shall 'always be vested in and perpetually remain with the Company of Merchants.' But, for the reasons which have been already stated, the Lord Ordinary has been unable to see how this can be held to import that the identical Hospital house in question, and ground on which it is built, or any other particular building and ground, must remain unchanged and unchangeable for ever, or that it means or was intended to mean any more than that the right to the Hospital, its house, stock, and revenue, whatever or wheresoever they might be, should be vested in the Merchant Company.

"In accordance with this view of the matter, no doubt or difficulty appears to have been entertained by the Governors of the Hospital and the Merchant Company, when, in 1736 and 1738, a proposal was made for the purchase from them of the ground called Thomson's Yards, acquired by them for the very purpose of having their Hospital house erected thereon, in terms of the first statute or rule of 1724; of their power to dispose of that ground to the Infirmary; and to acquire, as they did, in place of it, the ground on which George Watson's Hospital now stands. The significance of this transaction, and its bearing on the present discussion, are so obvious as scarcely to require to be dwelt upon. If those in right of Watson's Hospital in 1738 had the power of disposing of ground which had been acquired and was then held by them for the purposes of the institution, and especially for the purpose of erecting the Hospital house thereon, and of acquiring other ground in its place, the Lord Ordinary must own that he has been unable to see any good or sufficient reason for holding that the respondents, who are in right of the existing ground and Hospital house, have not equally the power to sell and dispose of them, and to acquire other ground whereon to erect another Hospital house. Whether it is expedient that this should be done, or whether it would be such an abuse to do it in the circumstances which here present themselves as to call for the interposition of the Court, will be afterwards considered; but in regard to the question of power, with which alone the Lord Ordinary is now dealing, he has to repeat that the transaction of 1738 appears to him to afford an instance of a very significant if not insuperable objection to the complainers' whole case. The only point they attempted to make in reply to it was that two of George Watson's original trustees were still alive in 1738, and that the transaction of that year was carried out only with their consent. But the Lord Ordinary cannot see how this can be held to affect the matter. He is unable to understand how the original trustees had or could have had any other or more extensive power of selling the Hospital grounds than those who succeeded them and came into their place. If those who are now in the full right and

management of the Hospital and its affairs have no right to change the ground and house, so neither could the original trustees; and *e converso*, if the original trustees had such a power, so must their successors; for the Lord Ordinary can find nothing in the constitution of the Hospital—in either the will or deed of settlement of George Watson himself or in the statutes or rules which were subsequently enacted—to show that a larger or different power, so far at least as the question now in dispute is concerned, was conferred or intended to be conferred on the original trustees than was devolved on their successors.

“So stood matters when, in 1740, the rules and statutes of 1724 appear to have been ‘revised, amended, and improved.’ No alteration however was then made upon them of any importance, so far as the present controversy is concerned. But in 1755 the rules and statutes bear to have been again ‘revised, amended, and improved,’ and then some alterations were made which appear to the Lord Ordinary to militate against the complainers. Thus, the second rule is altered to the effect of expressly empowering the Governors to grant tacks and other deeds necessary to enable them to manage the estate, stock, and revenues of the Hospital; and another alteration is made on the same rule to the effect, as the Lord Ordinary reads it, of expressly empowering the Governors to sell and purchase lands, without even excepting the lands of Heriot croft, on which the existing Hospital house now stands and then stood. This alteration is in these terms:—‘Providing also that the resolutions of the Governors to purchase lands, or to alienate, sell, or feu out the same, which they have power likewise to do, shall be approved by a general meeting of the Company of Merchants of Edinburgh.’ And to the rules or statutes, ‘as thus altered, amended, and improved,’ there is a declaration annexed by the two of George Watson’s original trustees who still survived, and three of the ministers of Edinburgh, with whose advice and consent the rules were altered, certifying and declaring that the statutes as so altered ‘are now the rules and statutes of the said George Watson’s Hospital; reserving, nevertheless, power, as provided in the said declaration, further to alter and improve the same, the fundamental articles of the said Hospital as therein recited being always preserved safe and entire.’ And to the statutes thus altered and amended there appears to be a ‘postscript’ by the two surviving trustees and the three ministers, which it is right to notice, as the complainers specially founded on it; and in which, amongst other things, there is the following clause:—‘As the Hospital house, whole stock, and revenue thereof are unalterably vested in the Merchant Company of Edinburgh, for whose behoof the mortification is chiefly designed, we hereby empower and require the Company to take all proper care that the statutes of the Hospital be duly observed.’ It was argued on the part of the complainers that, as there was here, as they represented it, a clear and distinct declaration to the effect that the identical existing Hospital house must remain unalterably vested in the Merchant Company, neither it nor the ground on which it stands can be sold as now proposed. The Lord Ordinary cannot so read this passage of the ‘postscript’ in question. He cannot, indeed, look upon the ‘postscript’ as containing any alteration of the rules or statutes, and he does not suppose that it ever was intended as such. It appears to the Lord Ordinary to be nothing else

than an expression by the parties who subscribed it of what they understood to be the meaning and effect of the rules or statutes; and if the Lord Ordinary be right in this, it follows that if this understanding be not supported by the terms of the rules or statutes themselves, no effect can be given to it. The rules and statutes speak for themselves, and must be interpreted according to the sound and true meaning of their terms, and not by the understanding of even the trustees of George Watson. It accordingly results that, if the Lord Ordinary be correct in the exposition he has already given of the rules and statutes themselves, the complainers can neither reap advantage nor suffer disadvantage from what is said regarding them in the ‘postscript’ in question. But in reality, and giving all possible effect to the terms of that ‘postscript,’ the Lord Ordinary cannot see how it helps the complainers in the slightest; for it does not appear to him that the passage on which they specially found amounts to anything more than a recognition of the fact—established by the rules and statutes, as well as George Watson’s deed of settlement—that the right to the house, whole stock, and revenue of the Hospital were always to be vested in the Merchant Company—that is to say, that the right to the house, wherever or whatever it was, just as of the other stock and revenue of the Hospital, should be unalterably vested in the Merchant Company; not that the house itself, any more than the other stock or revenue of the Hospital, should remain ‘unalterably’ the same thing—as impossible as it would be absurd to suppose it could be.

“So stands this matter on George Watson’s deed of settlement and relative statutes or rules. And the title-deeds by which the Hospital house and grounds are held are in accordance with the Lord Ordinary’s reading of the deed of settlement and rules themselves. An excerpt from the feu-charter under which the existing Hospital and grounds are held has been printed, and it bears to be taken in favour of the Merchant Company and Governors, ‘and their successors in office, for the use and benefit of the said Hospital, under the management and administration of said Governors, in manner and to the uses as in the statutes thereof is contained and directed, or to their assignees, heritably and irredeemably.’ It thus appears that under this title, and so far as its terms are concerned, the respondents are as much at liberty to sell and dispose of the Hospital house and grounds in question as any owner whatever of any heritable property.

“It only remains for the Lord Ordinary to say, in regard to the question of power, that there were cited in the course of the argument before him various authorities and cases; and, in particular, that there was cited for the complainers the case of the *Craigerook Mortification* (Bell’s Folio Cases, p. 49), and for the respondents the case of the *Merchant Company v. Heriot’s Hospital* (Morison, 5750). In the former of these cases the terms of the mortification are so rigid and absolute,—being to the effect that the lands were ‘never to be sold, but to remain as mortified land for ever,’—that it was impossible to hold that a sale was permissible. But although the terms of the mortification in the latter case of the *Merchant Company v. Heriot’s Hospital* appear to have been more adverse to a sale than those which occur in the present case—for the title was in the Governors ‘as feoffees in trust in perpetuity for behoof of the Hospital’—

the Court held that the Governors of Heriot's Hospital were entitled to feu out, or, in other words, to alienate lands forming part of the mortification. So also in the case of *Moore's Mortification v. Wilson*, June 25, 1814, F.C., where certain specific lands were settled in trust, that the rents and issues thereof might be given to and divided among the poor of the parish of Cardross 'for ever,' the Court refused a suspension at the instance of the purchaser of the superiority of the lands, brought to try the right of the trustees of the mortification to dispose of it. In like manner, in the case of the *Presbytery of Aberdeen v. Cooper and Others*, March 20, 1860, 22 D. 1053, this Court held that a Presbytery of the Church of Scotland, proprietors in trust for behoof of the managers and congregation of a chapel erected and held under titles containing a declaration that it shall be 'upheld, occupied, and used as a Presbyterian place of worship in all time thereafter,' were entitled to sell the subjects and apply the price in the erection of another church in a more suitable locality in the parish. And so also in the English case of the *Attorney-General v. The South Sea Company*, Nov. 17, 1841, 4 Beavan's Chancery Reports, a lease of charity lands for 999 years, held to be equivalent to an alienation, was upheld, the Master of the Rolls, Lord Langdale, by whom it was decided, remarking—'It is the duty of the trustees of a charity so to manage and dispose of the property entrusted to them as may best promote and maintain the charitable purposes of the founder;' and again, 'that in ordinary cases a most important part of this duty is to preserve the property; but it may happen that the purposes of the charity may be best sustained and promoted by alienating the specific property. The law has not forbidden the alienation, and this Court, upon various occasions, with a view to promote the permanent interests of charities, has not thought it necessary to preserve the property in specie, but has sanctioned its alienation.'

"The proposed sale in the present instance cannot therefore be said to be without authority and precedent. Whether there is anything in the circumstances in which the sale is proposed to be carried into effect to make it unwarrantable is a question which will be afterwards shortly adverted to. But before doing so, it is proper to notice a plea of informality which was urged by the complainants as fatal to the resolutions complained of, even supposing they were in themselves unchallengeable.

"(2) It was, in the second place, maintained by the complainants that, supposing the respondents possessed the power of sale claimed by them, their exercise of it in the present instance was invalid, inasmuch as they had not conformed themselves to a bye-law of the institution, which requires that 'Motions in reference to any business of consequence—that is, which may refer to alterations of the statutes or bye-laws, or to special grants of money beyond the ordinary expenditure—shall be given notice of at one stated or special meeting, and disposed of at a subsequent meeting before being acted upon.' But (1) the Lord Ordinary does not think that this bye-law applies at all to the present case, the proposed sale not referring to or involving an alteration of the statutes or bye-laws, or any special grant of money; for, if the Lord Ordinary be right in the construction he has put on the trust-deed and statutes as they exist, no alteration of them was necessary to enable the

respondents to pass the resolutions complained of. And (2) seeing that no particular mode or form of intimation is enjoined by the bye-law in question, and that at best it is directory merely, the Lord Ordinary is not disposed to think that any such informality can be held to have occurred as could invalidate the resolutions complained of, if otherwise competent and unchallengeable. Besides, having regard to the procedure which actually took place, as referred to and explained in the 12th, 13th, 14th, and 16th articles of the respondents' Statements of Facts, it is impossible to say that there was not the most ample notice to all concerned before these resolutions were finally passed. The subject was under the consideration of the Governors and Merchant Company, not on one, but on several occasions, and at different meetings, extending over a period, from first to last, of nearly a year; and it is not said by the complainants that they or any one else were taken by surprise in the matter.

"(3) The complainants maintained, lastly, that assuming the respondents possessed sufficient power to sell the Hospital house and grounds, and had exercised their power in regular form, the sale as proposed by them is not only inexpedient, but such an abuse of their power as to call for the interposition of the Court to restrain them from carrying it into effect. The Lord Ordinary cannot think so. It appears to him that it would require a much stronger case than anything the complainants have made out to justify the Court in interfering with the respondents in the exercise of their discretion, for if they possess the power to sell, their resolution to do so in the manner proposed by them, and in the circumstances in which the resolution was taken, is an exercise of their discretion and nothing more. There can be no presumption that the respondents intend anything wrong. It is not said that their object is to realise and divide amongst themselves the trust-estate under their charge. Nor is it said that they have any interest except to discharge their duty to the best of their ability. In short, so far as the Lord Ordinary can see from the papers, and so far as he heard at the debate, there is no room whatever for apprehension as to the intentions and objects of the respondents, or of these objects and intentions being objectionable. What then is it that can be justly complained of? It is not said that the price which the respondents are to get is inadequate. It is plain, indeed, that £43,000, which is the price they are to receive in the event of the proposed sale being carried into effect, in place of being an inadequate price, is a very large and desirable one, seeing that so recently as November 1861 the property for which that price is now offered was valued by the late Mr Scott of Craiglockhart, called upon to do so by the Governors of the Hospital themselves, at £27,130. With such a sum as £43,000 the respondents will be able to establish, as they say they are prepared to do, the Hospital in another place, in circumstances, as regards house accommodation and other requirements, much more suitable and advantageous than ever for the promotion of the true objects of the institution.

"The complainants seemed to object, however, to any sale of the present Hospital being gone into till other ground for the new house has been first purchased, or at least condescended on; but it is obvious that to sustain such an objection as this would be tantamount to preventing any sale of the Hospital at all in any circumstances. The Governors cannot be called upon to do anything so fool-

ish as either to purchase other ground for the erection of a new Hospital house before it is certain that a sale of the existing house and ground is to be carried into effect, or to announce beforehand what ground they may be desirous of obtaining, and in that way to enhance the price against them. If, however, the respondents should hereafter threaten to do anything reprehensible, or unduly abstain from carrying out the obligations incumbent on them as regards the purchase of other ground and the erection of another edifice, or in any other respect, redress will be open to them; but at present it cannot be presumed against the Governors that they intend to commit any breach of duty; and in the Lord Ordinary's opinion they have not as yet done or threatened to do so.

"The complainers also suggested, as the Lord Ordinary understood them, that in no view of the rights of the respondents were they entitled to enter into the transaction of sale in question without at least having first obtained the authority of the Court. The Lord Ordinary is, however, unable to see that there is much, if anything, in this suggestion. The respondents either have or have not the power to sell as proposed by them. If they have the power they can exercise it without the authority of the Court; and if they have not the power the Court cannot give it to them. The Court could only, at most, declare what is the power the respondents possess. But any such declaration is unnecessary, and probably would not be given, as the Court might be rather disposed to tell the respondents to act on their own responsibility, for, as was remarked by Lord Langdale in the case of *The Attorney-General v. The South Sea Company*, above referred to, 'that which the Court might have done upon its own consideration of what would have been beneficial to the charity, might have been done by the trustees upon their own authority, in the exercise of their legal powers.'

"In conclusion, the Lord Ordinary may notice that in the present case the sale complained of is only a conditional one—conditional on the Royal Infirmary obtaining statutory authority for transferring the site of their hospital from its present locality. They have accordingly applied to Parliament for such authority, and, according to the draft bill produced, which has been already moved in Parliament, not only is authority sought for transferring the site of the Infirmary, but compulsory powers are also sought for acquiring George Watson's Hospital and ground. The whole matter will thus be brought under the consideration of Parliament, and before anything can be done to carry into effect the proposed sale, statutory authority will be obtained for it. If the complainers think that such authority ought not to be granted, they can use the ordinary means of opposing the measure in Parliament. But in place of adopting that course they have resorted to the present suspension and interdict, which, if sustained, would have the effect of restraining the respondents from taking any steps for satisfying Parliament that the proposed transaction of sale is reasonable and unobjectionable. It is true that the complainers do not directly, or in express words, seek to interdict the respondents from appearing in Parliament in support of their desire to have the proposed sale carried into effect under statutory authority; but such, in reality, would be the result of the broad and unqualified interdict asked by the complainers

if granted; for they pray that the respondents may be interdicted 'from acting on, or attempting to carry into effect, any agreement or resolution to sell or alienate the said hospital or grounds;' and the complainers neither proposed nor indicated their willingness before the Lord Ordinary to qualify or restrict, in any respect or to any extent, the prayer of their application.

"In these circumstances, and for the reasons which have now been stated, the Lord Ordinary, being of opinion that the complainers have failed to establish a sufficient case for the interposition of the Court, has refused the suspension and interdict. It was stated in the course of the argument that the £12,000 originally left by George Watson for endowing the Hospital has fructified and increased to £200,000; and if this be so, the Lord Ordinary can very well understand that, in order not to defeat but to carry out the objects of the founder in a manner at once consistent with these objects and with modern requirements, a change of the Hospital house and grounds may be not only not objectionable, but highly desirable, if not absolutely indispensable."

Agents for Suspenders—Fyfe, Millar & Fyfe, S.S.C.

Agent for Merchant Company—Mr A. Kirk Mackie, S.S.C.

Agents for Infirmary Managers—Hope & Mackay, W S.

Wednesday, February 16.

SECOND DIVISION.

DUKE OF RICHMOND *v.* EARL OF SEAFIELD.

Salmon-Fishing—Barony Title—Rod Fishing—Net and Coble—Cairns and Stream—Possession—Titles. Held (1) that a barony title does not *per se* confer a right of salmon-fishing; (2) that fishing for salmon by means of the rod in places where fishing by net and coble may be practised is not available possession to acquire a right of salmon-fishing; (3) that fishing by means of cairns and stream is illegal, and therefore could not be founded on as possession available to establish a right.

Circumstances in which held that a proprietor of lands had under his titles, and the possession which had followed upon them, the exclusive right of salmon-fishing within certain boundaries in a river.

In this action the Duke of Richmond seeks to have it found and declared that he has the exclusive right to the salmon-fishings in the river Spey between two points described in the summons, including what are described as the Orton fishings, with a reservation to Captain Wharton Duff and his successors of the privilege of rod fishing, and the fishings *ex adverso* of the lands of Elie, Inchberry, and others, lying on the west side of the Spey. The pursuer founds upon Crown titles, containing an express grant of salmon-fishings. In explanation of these titles, he sets forth:—“(12) Under the titles specified in the first four articles above written, the pursuer and his predecessors and authors have for time immemorial, or at least for forty years and upwards prior to 1867, had the sole and exclusive possession of the salmon-fishings in the said river Spey between the points or