

1774. July 6.

WILLIAM CHRISTIE, and Others, *against* The MAGISTRATES and COUNCIL
of STIRLING, and Others.

PRIOR to 1637, John Cowan merchant, guild-brother, and burghess of Stirling, by his latter will, mortified the sum of 40,000 merks, to be employed on land or annualrent, for building an hospital or alms-house within the said burgh, and for the entertainment of twelve decayed guild-brethren, actual burghesses and indwellers of said burgh; or, at least, so many of them as the yearly rent of the said hospital or alms-house may be able conveniently to sustain within the same.

Part of this money his brother and heir Alexander Cowan employed on land; and, upon the 13th February 1637, entered into a contract with the Magistrates and Council, and ministers of said burgh, by which he obliged himself to infest the said Magistrates and Council, and their successors, in the lands therein mentioned; and also made over to them certain sums of money, in implement of his brother's settlement;—all to be effectually mortified, doted and given by the said Provost, Bailies, and Council of the said burgh, and their said successors, to the foresaid hospital or alms-house, which should be called, in all time thereafter, 'Cowan's Hospital;' and to the preceptor, minister, and poor thereof, under the patronage and government of the said Provost and Council, and their successors, and one of the ministers of the burgh; and he assigned to them the rents and annualrents of the subjects, and sums of money conveyed to them, for the use of the said hospital; and there being still a deficiency of 3400 merks to complete the 40,000 merks, the Provost, Bailies, and Council acknowledge their having received from him payment of that balance.

For which causes, the said Magistrates and Council obliged themselves to take down certain houses on the grounds disposed, and to cause build a sufficient hospital or alms-house, with consent of the said Alexander Cowan, for entertainment of the number foresaid of twelve decayed guild-brethren, actual burghesses and indwellers of said burgh, at least so many of them as conveniently the rent thereof may sustain: Of the which hospital, the said Provost, Minister, Bailies, and Council of the said burgh of Stirling, now present, and who shall happen to be for the time, shall, of consent of the said Alexander Cowan, be now, and in all time coming, perpetual and undoubted patrons, with the right of presentation of the beadmen and poor thereof.

And the said Magistrates oblige them to dote, mortify, &c. likewise, by the tenor thereof, dote, mortify, and dispoise to the preceptor or master who shall happen to be chosen of the said hospital, and to the said decayed guild-brethren who shall happen to be placed therein, and to their successors, masters, and decayed guild-brethren of the said hospital, all and sundry the fore-named lands, &c. disposed by the said Alexander Cowan to the said Provost, &c. together

No 3.

The administrators of an hospital have no power to make gratuitous alienations.

No 3. with all other lands, rents, revenues, and others, which shall happen to be acquired hereafter at any time by the said Provost, Bailies, and Council, and their successors, with the fore-named sums of money particularly before assigned to them, with all other sums of money that shall be given, or that belong to the said hospital, except so far as shall be employed on the fabric thereof, that therewith the said decayed guild-brethren may be entertained therein; and in which the said Provost, &c. oblige them and their successors to infest and seise the said preceptor and master of the said hospital, and decayed guild-brethren thereof for the time, and that by sufficient charter of mortification, containing precept of sasine to be holden of the said Provost, Minister, Bailies, and Council of the said burgh, undoubted patrons foresaid of the said hospital, in free heritage or feu-farm, *ac pura elemosina*, for ever, for payment to the said Provost, &c. of the feu mails and duties specified in the said Alexander Cowan and his said author's infestments thereof, above written.

Then follows an obligation on the said Provost, &c. to warrant to the said master and poor of the said hospital, all and sundry the foresaid lands and others both general and special, particularly above written, from all their own acts and deeds alienarly; that is, the said Provost, &c. nor their successors foresaid, have made, nor shall make no other alienation, &c. in hurt or prejudice of the said preceptor and poor of the said hospital, nor of their successors, by any manner of way.

They further bind them to deliver to the said preceptor, or master of the said hospital, in name of the poor thereof, all the writs and evidents which they have, or shall happen to acquire, of the forenamed lands and others, to be kept and used by them as their own proper writs and evidents. Likeas, how soon it shall happen the said hospital to be completely built, they bind them faithfully to bestow and employ the whole profits and duties of the fore-named lands, together with the annualrent of the fore-named assigned money, and all other rents and revenues that shall happen to belong thereto, upon the maintenance and entertainment, within the said hospital, of the foresaid number of twelve decayed guild-brethren, &c. and for upholding of the hospital, and all the fabrics thereof.

And, for the better government of the hospital, the said Magistrates, Council, and Minister, bind themselves to elect a preceptor and treasurer yearly.

In 1709, the patrons of this hospital made a purchase of the lands of Cam-buskenneth, holding of the Crown, in the shire of Clackmannan; and the rights thereof were taken in the name of the then preceptor, in whose favour charter under the Great Seal was expedite upon the procuratory therein contained, and on which infestment followed in the person of the preceptor.

Upon the 1st August 1772, an act of the Council of Stirling was passed, of the following tenor: ' Which day the Magistrates and Town-Council of Stirling, patrons of Cowan's Hospital, being convened, and taking to their serious consideration, that bodies politic and corporate, and mortifications, by the

' laws now subsisting, have no vote in elections for members in Parliament,
 ' however much lands and property they have holden of the Crown, whereby
 ' the superiority of their lands is of no consequence to them in that valuable
 ' respect; and considering that the hospital have both the property and superi-
 ' ty of the lands of Cambuskenneth and Craigton mill, and multures and se-
 ' quels thereof, called the barony of Cambuskenneth, and fishings, and other
 ' pertinents lying within the shire of Clackmannan; and being sensible of the
 ' good offices and friendly behaviour of Colonel James Masterton, present re-
 ' presentative in Parliament for this district of burghs, to the community of
 ' this burgh, and his attention to the interests and concerns of the same, the
 ' patrons resolved to show him some mark of their regard, by making an offer
 ' for his life, or of any two gentlemen he should name, of the superiorities and
 ' casualties of the said lands and barony, during their respective lifetimes.
 ' And the said Colonel James Masterton having signified, that it will be agree-
 ' able to him, that the said liferent-right be granted to Thomas Dundass, junior
 ' of Fingask, and Charles Dundass, Esq; his brother, second lawful son to Tho-
 ' mas Dundass, Esq; senior of Fingask, by such shares as may be agreeable to
 ' them; the patrons, therefore, unanimously grant and appoint the same, and
 ' authorise James Edmond, present master, factor or manager of the said hos-
 ' pital, to grant, subscribe, and deliver to the said Thomas and Charles Dun-
 ' dasses, such rights, dispositions, and conveyances to the said superiorities, and
 ' such small feu-duties as may be condescended on betwixt them, or their doers
 ' for them, and any two of the Magistrates patrons, but in such a way as to
 ' preserve to the hospital the property of the lands, teinds thereof, mills, mul-
 ' tures, and whole pertinents, and rents, and feu-duties, and other duties and
 ' fishings. The superiority and feu-duty to be so settled, excepted during the
 ' lives allenary of the said Thomas and Charles Dundasses respectively, they
 ' always paying at obtaining the conveyance, 20 years purchase of the feu-du-
 ' ties to be so settled, unto the said James Edmond, for the use and behoof of
 ' the hospital, and defraying the whole expenses of their own and the hospital's
 ' rights to be made out, and all other expenses concerning these matters.'

In execution of this measure, the master of the hospital, in whose name the
 rights have stood since the date of the purchase in 1709, resigned the lands in
 the hands of the Crown, for a new charter in favour of himself and his succes-
 sors in office; and having separated the property from the superiority by a feu-
 right, he thereupon disposed the lands with the burden of the feu, and assign-
 ed the Crown charter, on which no infestment had yet been taken, to the two
 Messrs Dundass in liferent, and himself, as preceptor of the hospital, in fee,
 whereupon Messrs Dundass were infest. And as, by the feu-rights granted as
 above, certain feu-duties had been taken payable, amounting to L. 5 *per an-*
num, so the minute of Council bears, that the Messrs Dundass were to pay at
 the rate of 20 years purchase for said feu-duties, being L. 5 Sterling.

No 3.

William Christie and others, under the title of merchants, guild-brethren, and burgesses of the burgh of Stirling, for themselves, and as a committee empowered by the guildry of said burgh, in conjunction with Hugh M'Kail writer in Edinburgh, therein designed great-grand-nephew, and one of the heirs of line of the deceased John and Alexander Cowans, concurred in bringing an action, containing a variety of conclusions reductive and declaratory, against the patrons of Cowan's Hospital, the two Messrs Dundass, and others; and the first article insisted on was the reduction of the foresaid act of Council, dated 1st August 1772, and dispositions granted, in consequence thereof, of the liferent-superiorities in favour of the Messrs Dundass.

THE LORD ORDINARY 'sustained the reasons of reduction of the dispositions of the superiorities to Thomas Dundass and Charles Dundass; and, in particular, that, from the deeds under challenge, there is evidence of a gratuitous alienation, though under cover of a price stipulated; and that the patrons of Cowan's hospital have, as such, no power of gratuitous alienation.'

Upon a reclaiming petition and answers, the Court disregarded the objections stated to the title of the pursuers; that to M'Kail's being obviated by written evidence, of his relation to the original founders, flowing from the Magistrates and Council; and as to the title and interest of the other pursuers, it was *observed*, that this mortification was in 'favour of the guildry,' which gave them a sufficient title; and, upon the merits, the COURT viewed the case in the same light with the Lord Ordinary, that this was a gratuitous alienation, prejudicial to the hospital, and beyond the powers of the patrons; and therefore adhered to the Ordinary's judgment.

Act. Hay Campbell. Alt. D. of Faculty, Sol. General. Clerk, Pringle.
Fol. Dic. v. 3. p. 276. Fac. Col. No 123. p. 330.

1795. May 20.

No 4.

Hospital of PERTH *against* PATRONS of BUTLER'S and JACKSON'S Mortification.

WHERE an estate is mortified to an hospital for maintaining a certain number of people, and the rents encrease beyond what is necessary for that number, the LORDS found that the surplus did not accresce to the hospital, but to the heirs of the donor. *See APPENDIX.*

Fol. Dic. v. 3. p. 277.

See MORTIFICATION.

JURISDICTION.

PRIVILEGED DEBT.

APPENDIX.