permission to purge is agreeable to decisions. The case of Pryce is a strong one. The only decision to the contrary is that of Westshiel. I have seen many settlements where there have been blunders that would have occasioned irritancies. My constant advice was to make up a new, clear title.

Justice Clerk. As the defender has done no prejudice to the estate, and is willing to submit to the entail, his plea ought to be received. The plea of the pursuer cannot be good, unless in so far as the presumed will of the donor is considered; and it cannot be conceived that, in a case so circumstanced, he would have required such an irritancy. The donor finding the *prædilecta persona* in his present situation would not carry over the succession to a person less favoured.

President. Of the same opinion. I do not love penal irritancies in entails. These are different from conventional irritancies.

Auchinleck. The only difficulty is, that there is no proper excuse for the neglect on the part of the defender. If this defence is good, then there is an end put to every process of this nature. For, if a man was never to be precluded, to what purpose bring the action? He may change backwards and forwards as often as he pleases.

Coalston. There are two questions here. *First*, Whether an irritancy has been incurred? *Secondly*, Whether the heir can be reponed against it? As to the *first*, I doubt whether an apparent heir of entail can commit an irritancy, and how far he can be bound to an impossibility, that of bearing the arms of Balnagowan. We cannot explain this condition to imply arms with a mark of cadency, for this were to create an irritancy. *2dly*, As to purging, there is indeed an old act of sederunt, of which I never could see the reason. I am never for extending irritancies.

Kaimes. The first thing to be considered is the tenor of the entail. There are no words in it implying that it was the intention of the entailer to declare the irritancy not purgeable. At present there is *bona fides* on the part of the defender, but there can be no *bona fides* after the judgment of the Court.

1766. *November* 19. The Merchant Company and Trades of Edinburgh *against* the Governors of Heriot's Hospital.

HOSPITAL.

Who entitled to call the Governors of an Hospital to account? Whether the Governors have power to feu out the Hospital lands? Whether the Court of Session may establish rules for the future administration of the affairs of an Hospital?

[*Faculty Collection, IV.* 46; *Dictionary,* 5750.]

In 1623, George Heriot, jeweller to King James the VI. executed a deed of settlement, whereby he gave certain subjects to the Magistrates and Town

Council, and Ministers of Edinburgh, and appointed them his feoffees *in trust*, for founding an hospital, and for purchasing lands in *perpetuity*, to be employed in the maintenance of certain poor boys.

He ordered that the hospital should be erected and governed in such form as should be set down by himself, or, in default of him, by Dr Walter Balcanquhal, Dean of Rochester.

As Heriot omitted to draw up those statutes, they were drawn up by Balcanquhal.

By him he ordered that a sum should be kept in the treasure-house of the Hospital sufficient to pay all common charges; and that all the money which, by debts, rents, or any other way shall belong to the Hospital, besides that which shall come into the stock of the treasure-house, "shall be bestowed upon lands and no otherways, for all time to come hereafter."

The majority of the Merchant Company, &c. brought an action against the governors. It contained many conclusions, and particularly that it should be declared that the governors have no powers to alienate or grant feus, or long leases beyond a certain term, of the lands belonging to the Hospital, but that the same ought to remain in perpetuity with the hospital; and that, supposing them to have such power, the said feus and long tacks ought to be granted only by public roup to the highest offerer, and that under such regulations as should seem meet to the Lords of Session: that the prices to be got for those feus, or the compositions for entries, and grassums for leases, ought not to be spent or dilapidate along with the common or annual revenue of the Hospital, but to be stocked out as a capital, bearing interest until the proper purchaser offer.

On the 9th August 1765, the Lords found that the governors of the Hospital had "power to feu out the lands belonging to the hospital, and concluded that this general expression. Assoilyies the defenders from the other declaratory conclusions of the libel."

The pursuers applied by petition, and prayed a rectification of this interlocutor, as expressing more than was intended, and as giving judgment on certain points which the Court had not considered.

On the 13th December 1765, the Court adhered: "but added this reservation, without prejudice to the parties, to be heard before the Ordinary, if the managers of the Hospital can alienate the feu-duties, or any part thereof, belonging to the Hospital; and upon that part of the conclusions of the pursuers' libel, which runs, *That the prices to be got for these feus or the compositions for entries and grassums for leases, ought not to be spent or dilapidated along with the common or annual revenue of the Hospital, but to be stocked out as a capital, bearing interest until a proper purchaser offer.*"

The Lord Auchinleck, Ordinary, took the questions to report.

Argument for the Pursuers:—

The first point is, Whether the Managers of the Hospital can alienate the feu-duties or any part thereof?

The solution of this question must depend upon the nature of the right meant to be vested in the Managers. The deed of settlement executed by Heriot, terms them *feoffees in trust*; and the lands purchased are to remain,

by his will, in *perpetuity* with the Hospital. So also Dr Balcanquhal provides, that all moneys *be bestowed upon land, and no otherways.*

A power to feu does not imply a power to alienate the feu-duties. Magistrates of royal boroughs have the former, but not the latter power. The same was the case of ecclesiastical persons. They might feu under the authority of the Pope, or of the King, but they could not alienate feu-duties.

A grant in feu-farm is indeed an alienation, as it conveys the *dominium utile*, but still the *dominium directum* remains; and this is consistent with the notion of the lands belonging in perpetuity to the Hospital: but when a sale of feu-duty is made, both the *dominium utile* and the *dominium directum* are conveyed away, and nothing remains but the price of the lands; so that it matters not, whether the lands be sold at once, or the lands be first feued out and the feu-duties afterwards sold.

The defenders plead, that the allowing the feuars to purchase part of the feu-duty, is no alienation; that the tenants pay three bolls of barley *per* acre; that the Governors feu at five bolls of barley *per* acre; and allow the feuar, within twelve months, to be relieved of one of the additional bolls, by paying for that at the rate of 26 or 30 years' purchase: that this is no alienation, but only implies that the revenue of the Hospital shall be either augmented by two bolls, or only by one, the value of the other being paid to the Hospital.

The fallacy of this argument lies in this, that the defenders do not distinguish between the actual yearly rent payable by the tenant and the actual yearly worth of the lands. Every one knows that three bolls of barley *per* acre, although it may be the rent, is not the yearly worth of lands in the neighbourhood of Edinburgh; and *this* the defenders themselves show, when they acknowledge that they grant feus at five bolls of barley *per* acre.

By the defender's argument, if the present rent is three bolls *per* acre, they may alienate every thing beyond that value.

Supposing five bolls to be the yearly value, the relief which is given to the feuar is precisely an alienation of twenty *per cent.*; for he who, being possessed of L.100 *per annum*, assigns away L.20 *per annum*, does evidently sell one-fifth of his estate.

How can the Governors claim a partial, and not a total power of alienation?—Both must depend upon the same principle.

The defenders acknowledge, that they are not allowed to lay out any part of the yearly revenue for the purpose of inclosing. But they contend, that they so lay out the feu-duty sold, for which they draw six *per cent.*,—that is, they bestow part of the yearly value upon inclosing,—though the founder permits them not to bestow part of the yearly revenue upon inclosing. The question is not what is best for the Hospital, but what it is which the Managers are authorised to do by the statutes? If the statutes limit them too much, the intervention of the Legislature is necessary for extending their powers.

It is however doubtful whether improvements, if consisting in houses, be beneficial. This may encourage tenants to build elegant houses, and then, upon a pretence of their having expended money of their own, to lay a claim for a feu of their leases.

The next question is, Whether the prices to be got for feus, or the compo-

sitions for entries and grassums for leases, ought to be spent or dilapidated along with the common or annual revenue of the Hospital, or ought to be stocked out as a capital bearing interest, until a proper purchaser offer.

This is expressly enacted by Balcanquhal. *To bestow upon land*, means for the purchase of lands; and so the Governors themselves, by various acts, have understood, when they ordered that the price of feus and of compositions should be turned into a capital sum, and not expended as yearly revenue.

As the necessaries of life increase in value, so also will the value of lands; but, from feued lands, no increase can be expected.

The common charges must be always paid; but this is provided for by the statutes.

ARGUMENT FOR THE DEFENDERS:—

A declaratory judgment, by way of prevention, is not competent. A judgment now pronounced, would not be *a res judicata* against any other set of pursuers.

The power of feuing implies a power of alienation. If the Governors alienate improperly, there will lie a personal action against them.

The proceeds of the feu-duties sold, are applied for the benefit of the Hospital. Its revenue is thereby increased, and an additional security is given for the payment of that revenue; besides, it is for the public utility that the lands be so improved, for the Governors themselves cannot improve them.

The expression in the statutes, " *bestow upon lands*," does not prohibit the spending of money for the improvement of lands. What is bestowed on inclosing, is bestowed on lands.

The acts of the Governors show, that they have been willing to give reasonable obedience to the statutes: so that there is no cause of complaint.

The compositions have been generally expended, as parts of the casual revenue; and most properly so, for such compositions are a casual revenue.

It is fit to observe, that a boll of barley, at an average for 20 years back, is 12s. 6d. in value; so that a rent of five bolls is £3 : 2 : 6, a high rent for lands uninclosed, even in the neighbourhood of Edinburgh, and there is hardly any example of the rent being raised by subinfeudations.

On the 19th November 1766, " The Lords found, That the Governors of Heriot's Hospital having granted feus, empowering the feuar, by the feu-contract, to purchase a relief from the payment of one boll out of five of the feu-duty, at a price from twenty-six to thirty years' purchase of such fifth boll, was a lawful act of administration; and that the laying out the money thus arising from such sales, on the compositions of entries and grassums for leases lawfully granted, upon the inclosing the Hospital's lands, or receiving six *per cent.* from the tenants, was properly applied: and assoilyied, but found no expense due."

Act. A. Wight, A. Lockhart. *Alt.* R. Blair, J. Montgomery. *Rep.* Auchinleck.