1794. *February 5.*

DR. ROBERT MOIR *against* DR. CHARLES ALEXANDER GRAHAM and Others.

No. 99.

A clause in an entail, prohibiting the heirs called to the succession from raising the rents beyond a certain amount, found to be revoked, by the entailer's increasing them in his own life-time above the sum specified.

Effect of the entailer's appointing the succeeding heirs to carry the arms of his family, where none such are matriculated in the Lyon-office.

George Moir, in 1787, executed an entail of the estate of Leckie, with strict irritant and resolutive clauses. Among others, it contained the following condition: "Nor shall it be in the power of the heirs-male of my body, or others, heirs foresaid, substituted to them, to increase the rental above £.1000 Sterling *per annum*, including kain and casualties, so as the rents may be always well and regularly paid; but without prejudice to the heir in possession to take *grassums* for any lease he may grant, not exceeding 19 years, of any part of said lands."

The rental of the estate, at the date of the entail, was £.895 Sterling; and when the leases expired, Mr. Moir augmented it, without any regard to this clause.

In 1791, he executed a deed, where, after making some alterations, but none on this clause, "he approves of the foresaid deed of entail, in all the other articles and clauses thereof."

At the time, however, when he executed this last deed, the rental of the estate exceeded £.1000; and at his death, in 1792, it amounted to £.1123 6*s.* without including any rent for 150 acres in his natural possession.

Dr. Robert Moir succeeded him, under the entail, and brought an action against the substitutes, concluding, that the said George Moir having increased the rental above the sum of £.1000, had thereby revoked the above-cited clause; and that, therefore, the pursuer should be at liberty to keep up and augment the rent of the entailed estate, as freely as if it had not been inserted. In support of this conclusion, he

Pleaded: As the clause in question has been so far infringed by the entailer himself that it cannot be complied with *in terminis*, it must be wholly at an end. It does not prohibit the entailer from maintaining the rental as he found it; and it would not be the prohibition in the entail, but a new and a different one, which would restrain the heir in possession from increasing it still farther, at the expiration of the current leases.

Answered: The deed of alteration executed by Mr. Moir, revoking certain clauses of his entail, and approving of all the others, at a period when he had raised his rental to above £.1000, precludes any presumption that he meant to recal the condition in question. Indeed, supposing he had not made such a deed, there would have been no room for that presumption. By taking a higher rent himself, he exercised the right of an unlimited proprietor; but did nothing which was inconsistent with his intention of circumscribing the powers of his successors. The surplus rent, which he himself stipulated, may no doubt be levied by the pursuer; but were he to renew the current leases, without confining the rent of the whole estate to £.1000, as he would then, by a voluntary act of his own,

No. 99. be violating the terms of the entail, he would be guilty of an act of contravention.

The Lord Ordinary reported the cause on memorials.

After a good deal of reasoning, the Court came to be of opinion, That the clause was to be held as discharged by the entailer, *rebus ipsis et factis*. Some of the Judges at first doubted, whether succeeding heirs could raise the rental above the sum it amounted to at George Moir's death; but it was observed, That even if this had clearly been his intention, yet, as limitations on property were unfavourable, and as the clause did not contain that precise prohibition, it ought not to be inferred by implication. The entail contained no clause obliging the heirs in succession to *diminish* the rental; and no heir in expectancy could have an interest to insist on his doing so.

It was accordingly found, unanimously, "That the tailzier having, in his own life-time, raised the rent beyond £.1000 Sterling yearly, the clause restraining the heirs of entail from increasing the rent of the tailzied estate beyond that extent was thereby virtually revoked by the tailzier himself, and is now at an end."

The entail likewise contained the following clause: "And that the heirs of tailzie foresaid, succeeding in virtue hereof, shall be bound to use the name and title of Moir of Leckie, and that alone, exclusive of every other name and title; and to carry the arms of Moir of Leckie, without any addition, diminution, or alteration of any kind."

After the action came into Court, it was discovered that there were no arms of Moir of Leckie matriculated in the Lyon-office. The pursuer being the heir, *alioqui successurus*, only in one fourth of the estate, as representative of one of four heirs-portioners, it was likewise doubted, even if there had been such arms, whether they were assignable to heirs of entail, or whether they necessarily descended, *jure sanguinis*, to Mr. Moir's heir of line.

The following conclusion was therefore added to the summons: "That the said pursuer, and the heirs of entail foresaid, are under no restraint with regard to the carrying of any particular arms, as the arms of Moirs of Leckie, and are exposed to no challenge for disregarding the clause in the entail; or, at least, that the pursuer, and each succeeding heir, shall be at liberty to obtain arms from the Lyon-office, and, whatever they may be, to wear and use them as the arms of the Moirs of Leckie; and if used, without addition, diminution, or alteration of any kind, by the pursuer and the said heirs, that this shall be held sufficient implement of the provision relating to the arms in the entail."

The defender contended, That it was a lawful condition in a tailzie to a stranger, that he should bear the granter's arms; and quoted Sir George Mackenzie's Essay on Heraldry, p. 70. as supporting this opinion.

On the other hand, it was stated for the pursuer, That he wished, as far as possible, to comply with the entailer's intention; but that he was advised, that even

where there were arms in a family, they could not descend to a tailzied succession, without certain distinctions. And he quoted the case put in L. 27. D. De Condit. et demonstrat. (Lib. 35. Tit. 1.) as analagous to the present; and as suggesting, that the condition in question should be so modified by the Court as to make it consistent with the law of the land. No. 99.

The Lords "found it incumbent on the pursuer, and the other heirs of entail, to follow out the tailzier's appointment, in carrying the name and arms of Moir of Leckie; and, for that purpose, to obtain from the Lyon-office arms of that description, descendible to the heirs of entail of Leckie."

Lord Reporter, *Justice-Clerk.* Act. *Maconochie.* Alt. *Bell.* Clerk, *Gordon.*

R. D. *Fac. Coll. No.* 101. *p.* 224.

1799. *January* 15.

JAMES BRUCE and CHARLES SELKRIG *against* MRS. ANN BRUCE and Others.

No. 100.
The prohibitory clause of an entail was directed against the different acts therein mentioned, and particularly against a sale of the lands: The irritant clause referred, in general terms, to the prohibitory one: The resolutive began with a similar general reference, and there was added in it an enumeration of particulars, on his doing any one of which the heir in possession should lose his right to the lands: But "selling" not being one of them, it was

The lands of Kinross were entailed, in 1693, and, after being held by various substitutes, an act of Parliament was, in 1768, obtained, authorising a sale of them, for payment of certain debts affecting them. The act directed the reversion to be employed in the purchase of lands, which should be entailed on the same terms with the former.

The lands of Tillicoultry were purchased, and entailed accordingly.

By the entail, the heirs are enjoined to bear the name and arms of Bruce of Kinross, under a forfeiture; and it is farther declared, that it shall not be "lawful to the said James Bruce, or any of the heirs of tailzie and provision above written, succeeding in the right of the rights of the foresaid lands and estate, by virtue of the foresaid tailzie and substitution, and of these presents, or any of them, to sell, annailzie, dispone, dilapidate, or put away, the foresaid lands and estate, nor any part nor portion thereof, nor to break, innovate, nor infringe this present tailzie, nor contract nor on-take debts, nor do no other fact or deed, civil or criminal, whereby the said lands and estate may be anywise apprised, adjudged, evicted, or forfeited from, or anywise affected in prejudice and defraud of the subsequent heirs of tailzie above mentioned *successivè*, according to the order and substitution above written; neither shall it be leisome nor lawful to the said James Bruce, or the heirs of tailzie and provision foresaid, to suffer and permit the said lands and estate, or any part thereof, to be evicted, adjudged, apprised, or any otherwise evicted, for any debts or deeds contracted or done by them before their succession, or any of their predecessors, whom they shall anywise represent, or wherein they shall be liable as representing them."

Then follows an irritant and resolutive clause—"All which deeds are not only declared void and null, *ipso facto*, by way of exception or reply, without declarator, in so far as the same may burden and affect the foresaid estate; but also it is