

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.

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.

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 leosome 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 resolute 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

No. 99.

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 resolute 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

No. 101.
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hereby provided and declared, that the said James Bruce, and the other heirs of tailzie, who shall contravene and incur the said clauses irritant, or any of them, either by not assuming the name and arms of Bruce of Kinross, or by the said heirs-female, they being unmarried, and not marrying a gentleman of the said name, or who shall assume, bear, and carry the said name and arms, or, being married, they and their heirs of the said marriages, not bearing and carrying the said name and arms, as aforesaid, or by the said heirs their not accepting of the benefit of this present tailzie, within year and day after the decease of the immediate preceding heir, to whom they may succeed in manner *respectivè* foresaid, or who shall break or innovate the said tailzie, or contract debts, or commit any other fact or deed, whereby the said lands and estate may be anywise evicted or affected in manner foresaid, or who shall suffer and permit the said lands and estate, or any part thereof, to be evicted, adjudged, or appraised, or anywise affected for any debts or deeds contracted or done by them before their succession, or by any of their predecessors whom they shall represent, and wherein they shall be made liable, or anywise representing them; that then, and in any of the said cases, the person or persons so contravening, as said is, shall forfeit, amit, and tyne their right of succession of the aforesaid lands and estate, and all infestments or pretended rights thereof in their persons shall from thenceforth become extinct, void, and null, *ipso facto*, by way of exception or reply, without declarator, as said is, and the same shall devolve, fall, and belong to the next and immediate heir of tailzie in being for the time, who is ordained to succeed to the foresaid lands and estate, by virtue of the tailzie and substitution foresaid."

James Bruce, an heir in possession, and Charles Selkrig, the trustee for his creditors, concurred in selling part of the lands, and brought a declaratory action against the substitutes of the entail, to ascertain the validity of the sale, which was conjoined with a suspension raised by the purchaser.

Mr. Bruce, and the trustee for his creditors,

Pleaded: The restrictions of an entail cannot be extended, by implication, even against heirs, and still less against creditors and purchasers. To make it effectual against the latter, it must contain a resolute, as well as a prohibitory and irritant clause; 11th March, 1707, Heiress of Redheugh against Forsyth, No. 80. p. 15489.; 22d July, 1712, Creditors of Riccarton, No. 81. p. 15494.; 8th February, 1758, Creditors of Humbie against his Children, No. 86. p. 15507.; 22d January, 1760, Bryson against Chapman, No. 87. p. 15511.; directed against the special act which is in any instance called in question.

In the present case, the prohibitory clause is specially directed against "selling," and the irritant clause refers to it in general terms; but although the resolute sets out with a similar reference, there is afterwards subjoined an enumeration of the different particulars on doing any one which a forfeiture should be incurred by the heir in possession, and as "selling" is not among the number, a sale would not

create a forfeiture against himself; and consequently it must be effectual against the substitutes. No. 101.

The heirs of entail

Answered: The act 1685, C. 22. has prescribed no technical form in which the different restricting clauses shall be expressed. It is sufficient that their meaning be clear, and that they be so connected as to apply to any act of contravention which may be challenged. In this case, the prohibitory clause is admitted to be accurate and complete. It is likewise admitted, that the reference to it in the irritant clause is sufficient. And the similar reference with which the resolute clause commences cannot be restricted by the superfluous and cursory enumeration of particulars which is subjoined.

Besides, "selling" is comprehended under the general words "break or innovate," particularly as they refer to the prohibitory clause, which is more minutely expressed; as likewise under the words "fact or deed," by which the lands may be anywise evicted or affected in manner foresaid." Indeed, "affected" is clearly used in this sense in the irritant clause, the accuracy of which is not disputed.

Replied: "Selling" is not included under the expressions, "alter or innovate," which apply to voluntary alterations of the succession; 17th June, 1746, Heirs of Campbell against Representatives of Wightman, No. 85. p. 15505.; nor under the words "fact or deed," by which the lands may be "evicted or affected," which are technically appropriated to feudal or other delinquencies. Such general words have been found not to apply to "selling," even in questions as to the effect of prohibitory clauses among heirs; 8th November, 1749, Sinclair against Sinclairs, No. 22. p. 15382. Indeed, similar expressions occur in the prohibitory clause, although "selling" had before been specially guarded against.

The Lord Ordinary reported the cause on memorials.

The Court, on the grounds above stated, were much divided in their opinion.

The Lords (26th June, 1798,) "sustained the defences." But, on advising a reclaiming petition, with answers, they, by a casting vote, gave judgment in favour of the pursuers.

Lord Ordinary, *Craig.*

Act. Solicitor-General Blair, *John Clerk.*

Alt. Lord Advocate Dundas, *Montgomery.*

Clerk, *Menzies.*

D. D.

Fac. Coll. N^o. 99. p. 232.

* * This case was appealed. The House of Lords ORDERED, That the interlocutor complained of be affirmed.