1779. *March 2.* JOHN LESLIE of Balquhan *against* DAVID ORME.

TAILYIE.

Powers of the Heir in granting leases.

[*Faculty Collection, VIII.* 141; *Dict.* 15,530.]

MONBODDO. There is no lesion here; but I doubt of Leslie Grant's power to give a lease for five times nineteen years. I cannot distinguish between a feu and such an alienation. In figures the difference is not great. Here the heir of entail deprives future heirs of the principal right in the estate,—the right of possessing. There is no clause in this entail against letting leases, but I must understand the power of letting leases, according to the custom of the country. Long leases were not practised in these times: *mos regionis* is a good rule. If a lease for five times nineteen years is good, I do not see where the line is to be drawn.

ALVA. If this is not an alienation, and if such liberties are to be taken by heirs of entail, no entail can be made effectual. This lease was made *in fraudem* of the entail.

GARDENSTON. The only thing that Leslie Grant could do, in justice and in gratitude, was to make this lease, which was within his power. Every thing is permitted by an entail which is not expressly prohibited. The entail permits leases even with the diminution of rent. How can we call this tack an alienation? A tack even for 100 years is not an alienation; he who holds an heritable property feels the difference between an alienation and a long lease. However the case may stand in figures, the life of one man may see two-thirds of this lease expire. Would such a man at that period hold the remainder to be equal to an alienation?

KENNET. This tack, if granted for an elusory tack duty, might be reduced; but of this there is no evidence.

BRAXFIELD. An heir of entail, although limited, is still a proprietor. He is not tied down in cases not expressed. Leslie Grant was not limited as to the granting of leases. If the money laid out by Mr Orme, for recovering the estate, were a burden entailed on the estate, I should give my opinion for reducing the lease; or if I saw that this lease was granted at an under value, I should be willing to circumscribe it, so as to grant an indemnification to Mr Orme, and no more.

KAIMES. I have no doubt of Leslie Grant's powers: if he had no other resource for paying Mr Orme, I should be inclined to support the lease; but the argument from *in rem versam* has a plausible appearance.

PRESIDENT. If Mr Orme could have any indemnification from the heirs of entail, I should have no doubt of reducing the tack. In that view the whole

circumstances of the transaction ought to be considered. Mr Orme, a confidential person, an estimate of grassums altogether speculative, and deeds after deeds taken. But I think that no claim lies against the heirs of entail; and in that view I consider Mr Orme as an innocent man, and Leslie Grant as one doing no more than justice to a benefactor. Even a minor could not have been restored against such a lease. Friend as I am of entails, I will not stretch them. The heir of entail, in this case, is not limited as to granting leases: and, in the case of *Fraser of Belladrum*, the House of Lords found a lease of 900 years good even against singular successors.

WESTHALL. The lease of the house of Fetterneer, and the gardens, cannot be supported in consistency with the decision in the case of *Greenock*. As matters now stand, the heir of Balquhain has not a cot-house on his estate, where he may reside, for fifty or sixty years to come.

HAILES. The house of Fetterneer may not, perhaps, be in good repair; yet it is the capital messuage. And if the estate fell to heirs-portioners, it would belong to the eldest without division.

BRAXFIELD. I doubt as to the tack for the fifth nineteen years: that lease is not an act of administration, but an exertion of a power of disposing of the estate, which was not in the granter.

On the 2d March 1779, "The Lords reduced the tack of the house and gardens of Fetterneer; and also the lease for the fifth nineteen years;" altering so far Lord Covington's interlocutor.

Act. R. Blair. *Alt.* D. Græme.

Diss. as to fifth nineteen years, Kaimes, Kennet, Gardenston, Covington.

1779. *February* 12, and *March* 9. MARY and JEAN RUSSELS *against* JOHN RUSSEL.

CONQUEST.

Where Conquest-lands have been sold, the *jus representationis* takes place upon the price.

[*Fac. Coll. VIII.* 147; *Dict.* 3072.]

JUSTICE-CLERK. Although it were granted that the father might have settled his estate on the eldest heir-portioner, with burdens to the other heirs, yet the present case is different; for the father has limited himself, by the marriage-contract, not to do any fact or deed to alter the course of succession. *Here* he has done more: he has settled the estate on the *second* son of a younger daughter: if this is lawful, what is the use of such clauses in marriage-contracts?

MONBODDO. Many decisions are quoted on either side; but I would determine every cause on its own circumstances. There is a distinction between the lands and the conquest, which consists of money. By heirs is meant heirs one or more. The lands, in the present case, must go to heirs-portioners; and the father cannot prefer one daughter to another. As to the conquest, there is