price. He cannot refuse both, and at same time retain possession of the subjects purchased. The respondent's alternative claim is therefore fair and reasonable, that he accept the progress as offered, or void the agreement and possession.

After hearing counsel, it was

Ordered and adjudged that the said appeal be dismissed, and the interlocutors complained of be affirmed, with £100 costs."

For Appellants, *Al. Wedderburn, E. Perryn.*
For Respondent, *J. Montgomery.*

Miss ANNA BRUCE, - - - *Appellant;*
JAMES BRUCE CARSTAIRS, Esq. - *Respondent.*

House of Lords, 11*th May* 1773.

ENTAIL—EXERCISE OF POWER—PROVISION.—In an entail power was given to the heirs of entail to burden the estate with provisions to their husbands, wives, and children, "such as the estate could conveniently bear and allow." In 1748 the heir in possession burdened it with a provision of £1000; and thereafter, in 1759, burdened it with a second bond of provision to the same party for £1000. Held, in an action for payment of both bonds, that the heir in possession had not exceeded his powers, and that by the first bond his powers were not so exhausted as to prevent him from granting the second.

Sir William Bruce entailed his estate of Kinross upon himself and the heirs-male of his body; whom failing, upon a series of substitutes. It contained the usual prohibitory, irritant, and resolutive clauses against alienation and burdening the estate, from which were excepted his own male descendants. But power was given to the "haill heirs of "taillie and provision, to provide their husbands, wives, "bairns, and children, to competent and convenient liferent "portions and provisions, such as the said estate may con- "veniently bear and allow, and shall be agreed to by two "of the nearest relations, one on the father's side, and one "on the mother's side, these not to exceed ——." A blank was left for the amount, but not filled up.

1773.

BRUCE v. CARSTAIRS.

He also entailed the estate of Arnot, subsequently acquired by him, worth £300 per annum, on the same persons, except in one article, where he limited this of Arnot to the heirs-female of his daughter by her first marriage with Sir Thomas Hope, by which arrangement the two estates stand vested in separate persons, the appellant and the respondent.

Sir William died in 1709, and was succeeded in both estates by his only son, upon whose death, without issue, both estates came to his only sister, Anne, Lady Hope, who, by her first husband, had two sons—Sir Thomas and Sir John Bruce Hope—and by her second husband, one son, James Bruce Carstairs, the respondent's father, and three daughters. On her death both estates descended upon her eldest son, Sir Thomas Hope, who, dying without issue in 1740, was succeeded by his brother Sir John Bruce Hope. Sir John had three sons, who all predeceased him without issue, and one daughter, of his second marriage, the present appellant, and by his death in 1766, the Kinross estate came to his half-brother, the late James Bruce Carstairs, and that of Arnot to the appellant.

The last Sir John Hope, in virtue of the powers conferred upon him by the Kinross entail, charged the estate with provisions, one of £1000 in 1748, and another for £1000 in 1759, by heritable bonds over the estate. In granting these he had, as provided by the entail, the consent of the nearest relation, on the father and mother's side, concurring thereto.

The question was, Whether the appellant was entitled to recover payment of both bonds, and whether this double portion was not an unfair exercise of the power conferred?

The Lord Ordinary at first repelled the defences as to both bonds, holding them as legally due and exigible; but

Dec. 15, 1770. afterwards, of this date, he found that the "bonds of provi-
"sion of £2000 executed by Sir John Bruce in favour of
"his daughter Miss Bruce, his only child, besides his heir,
"with consent of two of the nearest friends, was a rational
"deed, conformable to the will of the entailer; but then,
"considering that the bonds were kept by Sir John without
"delivery, and not intended to be effectual till his death,
"before which time Miss Bruce became heir-presumptive to
"him in the estate of Arnot, and in other valuable subjects,
"and ceased to be a bairn or child, in the sense of the
"entail, needing a portion or provision, finds that Miss

" Bruce, now of Arnot, has no claim to the said sum of
" £2000, not only *quia res devenit in casum a quo incipere*
" *vel potuit;* but also because a consent adhibited by the
" nearest friends to a rational provision in favour of Miss
" Bruce, a younger child, not otherwise provided, will not
" infer their consent that she should be entitled to any pro-
" vision after so remarkable a change of circumstances in
" her favour, and therefore assoilzies."

On reclaiming petition the Court altered, and repelled the Feb. 26, 1772.
" defence, in so far as concerns the bond of provision granted
" by the deceased Sir John Bruce to the petitioner, in the
" year 1748; but sustain the defence *quoad* the bond of pro-
" vision granted by him to her in the year 1759, and remit
" to the Lord Ordinary to proceed in the cause according-
" ly."

Against these last interlocutors the present appeal was brought to the House of Lords.

Pleaded for the Appellant.—The clause of the entail enabled Sir John Bruce to charge the Kinross estate with portions to his younger children, " competent and convenient, " and such as the estate may conveniently bear." Under this clause Sir John possessed a discretionary power to grant such provisions; and, in granting the £2000 in question, he has not exceeded or abused that power, and not being limited in the *amount* of the provision so to be given, the Court have no power to control what he did, or restrict the provisions so made. This the more especially holds, where the provision so conferred was rational, competent, and such as the estate could bear. He had then only one son and daughter, and no probability of more children. It was this which induced Sir John to execute the second bond, in regard to which the Court of Session have sustained the defence; but that bond, granted in 1759, was just as good as the first. It was granted with the consent of his son, and the two nearest relations on the father and mother's side. It was rational in itself, and, besides, conformable to the will of the entailer, and if conformable to the will of the entail, this rationality cannot in the least be affected by the chance circumstance of the appellant's succeeding to the estate of Arnot; and the daughter's provision is not voided thereby, either at common law, or by the words of the entail. The debts affecting the estate of Kinross amount to £7000; the rent is £1000 per annum, so that the estate is well able to bear a charge of £2000 more.

1774.

COLTART v. FRAZER.

Pleaded for the Respondent.—The entail requires that the provisions be "competent and convenient, such as the estate "may conveniently bear." Here the estate was heavily burdened; and, looking to the circumstances of the appellant, (Sir John's daughter,) who has been otherwise amply provided for, the second bond for £1000 was both unjust and irrational. Burdened already with £7000, the sum of £2000 was more than the estate could conveniently allow, and consequently Sir John has exceeded the power of burdening given him by the entail. Besides, by the execution of the first bond for £1000, which was ample and sufficient in the circumstances, this power ought to be viewed as having been thereby extinguished, so as to foreclose him from again resuming a power which had been already fully exercised in terms of the entail; and no consent of the relations on the father and mother's side could validate such an exercise of the power, unless specially conferred by the deed.

After hearing counsel, it was

Ordered and adjudged that the several parts of the interlocutors complained of in the appeal, so far as they sustain the defence *quoad* the bond of provision granted by the deceased Sir John Bruce to the appellant in 1759, be *reversed*. And it is further ordered, that the defence be repelled, and that the cause be remitted back to the Court of Session in Scotland to proceed accordingly.

For the Appellant, *Ja. Montgomery, Al. Wedderburn.*
For the Respondent, *Al. Forrester, Dav. Rae.*

Unreported in Court of Session.

JOHN COLTART, - - - *Appellant;*
WILLIAM FRAZER, - - - *Respondent.*

House of Lords, 28*th January* 1774.

SERVITUDE—THIRLAGE.—The servitude of thirlage cannot be constituted by usage of grinding corn at a mill, and paying insucken duties, without written title astricting the lands to the mill; and though these may have been originally astricted, yet where, by the subsequent charters and title, these are freed and released therefrom, this must govern the question.

The lands, miln, multures, and appurtenances of Kirk-