

March 24,
1817.

LEASE FOR
LIVES.—
AGREEMENT.
—SPEC. PER.

is made that the naming the lives now renders the performance a different thing (which is the case) from what it would have been if the lives had been originally named, as the lives if named at first might have dropped by this time, yet it is clear that the parties were going on as if the one had been entitled to performance, and the other had been bound to perform ; so that, not using the words in any offensive sense, there seems to have been a mutual default here. I have said these few words because I am anxious that this should not be considered or understood as a decision, that, under such an agreement as this, a party may lay by as long as he pleases, and then apply with effect for a specific performance. It is only on the particular circumstances of this case, taking it out of a general rule, that the decision is founded. But under these particular circumstances I think the decree, subject to the proposed variations, ought to be affirmed with 100*l.* costs.

Decree *affirmed* accordingly, with alterations as above.

SCOTLAND.

APPEAL FROM THE COURT OF SESSION.

ROBERT GEORGE STEEL—*Appellant*.

ROBERT STEEL and others—*Respondents*.

June 18, 24,
1817.

Entail, with restrictions upon the heirs and *members* of tailzie. Held by the House of Lords, affirming a deci-

sion of the Court of Session, that the institute was not included in the word *members*, as used in this particular entail; the word appearing to be used in the same sense as the word *heirs*, and the case being therefore within the principle of decision in the Duntreath case.

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BERS OF TAIL-
ZIE, AS THE
WORD MEM-
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IN THIS EN-
TAIL.

Entail of Bal-
dastard; 6th
March, 1790.

BY a deed of entail, executed 6th March, 1790, George Steel, of Baldastard, gave, granted, and disposed, with and under the conditions, provisions, and declarations, prohibitive, irritant, and resolute clauses therein inserted, his estate of Baldastard to and in favour of himself in life-rent, for his life-rent use only, and to George Steel his nephew, and Harriet Applin his spouse, in conjunct fee and life-rent, and the heirs whatsoever of the body of the said George Steel in fee; whom failing, to his own nearest heirs and assignees whatsoever; whereby George Steel became disponee or institute under the deed. The procuratory of resignation was granted in terms of the above dispositive clause, but declared to be also “under the conditions, prohibitory
“irritant and resolute clauses, powers, and facul-
“ties after expressed, and appointed to be inserted
“in the charters, saisines, &c. of the foresaid lands
“in all time coming, and to be observed *by all my*
“*heirs and substitutes above named.*” The deed then, after providing, *primo*, that, in case the estate should devolve on heirs female, the eldest daughter should succeed without division, proceeded with the prohibitory, irritant, and resolute clauses as follows:

“*Secundo*, That every *person* and heir, whether
“male or female, who shall succeed to the foresaid

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Prohibition
against sell-
ing.

“ lands, &c. and their heirs and successors what-
 “ soever, shall immediately upon their succession,
 “ assume and take, and afterwards bear and carry,
 “ the surname and arms of Steel of Baldastard:
 “ *Tertio, That it shall not be leisome or lawful to*
 “ *any of the said heirs or MEMBERS of tailzie, or*
 “ their descendants, who shall succeed to his estate,
 “ to bruick or enjoy the same, or any part thereof,
 “ by any right or title whatsoever, other than this
 “ present deed of entail: *Quarto, That it shall not*
 “ be leisome or lawful to, or in the power of all or
 “ any of the said heirs, to alter, innovate, or change
 “ the order of succession above laid down, nor yet
 “ to do any other act or deed, directly or indirect-
 “ ly, whereby the same may be any ways innovated
 “ or changed, nor yet to grant tacks for any space
 “ longer than nineteen years, nor to accept of any
 “ tack-duty under the present rental, at least not
 “ without a regular roup, publicly advertised in the
 “ Edinburgh newspapers: *Quinto, That it shall*
 “ *not be in the power of all or any of the said heirs*
 “ *or MEMBERS of tailzie, or their successors, to sell,*
 “ *dispone, wadset, or impignorate all or any part*
 “ *of the lands or estate before-mentioned, nor to*
 “ grant bonds or infeftments of annual rent or an-
 “ nuity furth of the same, or any other right, re-
 “ deemable or irredeemable, which may in any ways
 “ affect or burden said estate, or any part thereof,
 “ or to contract debt, or commit treason, nor to do
 “ any other fact or deed of omission or commission,
 “ either civil or criminal, whereby the lands and
 “ estate above-disponed, or any part thereof, may
 “ anyways be burdened, incumbered, apprised,

“ adjudged, affected, evicted, or become caduciary,
 “ escheat, or forfeited ; nor shall the lands and es-
 “ tate aforesaid, or any part thereof, be subject, or
 “ liable to any debts or deeds, civil or criminal, of
 “ all or any of the said heirs of tailzie and substi-
 “ tution, or their heirs, contracted or done before
 “ or after their succession to the lands and others
 “ above-mentioned ; *all which debts, acts, and deeds*
 “ *are hereby declared void, in so far as they may*
 “ *affect all or any part of said estate: Sexto,*
 “ That the said George Steel and Harriet Applin,
 “ and the whole OTHER heirs and MEMBERS of tailzie
 “ above-mentioned, and their heirs and successors
 “ who may happen to succeed to the said lands and
 “ estate, shall be bound and obliged to pay to Ann
 “ Applin, presently residing with me, daughter of
 “ William Applin, clerk in the East India House
 “ at London, deceased, an yearly annuity of 100*l.*
 “ sterling after my decease, at two terms in the
 “ year, Whitsunday and Martinmas, by equal por-
 “ tions, beginning the first term’s payment thereof
 “ at the first term of Whitsunday or Martinmas
 “ that shall happen after my death and so furth
 “ thereafter during her life-time, with a fifth part
 “ more of penalty, in case of faille, and annual
 “ rent from each term’s payment, till payment of
 “ the same ; which annuity is hereby declared to be
 “ a real burden on the foresaid lands and estate dur-
 “ ing the subsistence thereof: *Septimo, That the*
 “ *whole heirs and MEMBERS of tailzie above-men-*
 “ *tioned,* and their heirs and successors who shall
 “ happen to succeed to the said lands and estate,
 “ shall become bound, as by their acceptation

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Irritancy.

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Resolutive
clauses.

“ hereof they become bound and obliged, *to perform*
 “ *and observe EVERY ONE of the different clauses*
 “ *and articles before-mentioned: declaring always,*
 “ as it is hereby expressly provided and declared,
 “ *That in case all or any of them shall contravene*
 “ *and do on the contrary hereof, or of any of the*
 “ *conditions, provisions, and obligations before spe-*
 “ *cified, or omit and neglect the fulfilling and ob-*
 “ *serving the same, such person or persons so con-*
 “ *travening, or omitting and neglecting, shall, im-*
 “ *mediately upon such contravention, lose, tyne, and*
 “ *amit all right, title, and interest which they have*
 “ *or can pretend to by this present deed, and the*
 “ succession to the foresaid lands and others shall
 “ immediately devolve upon and descend to the next
 “ heir-substitute, by this present right, in the same
 “ manner, though descended of the contravener’s
 “ body, as if they had been naturally dead, or not
 “ mentioned herein; and the person so succeeding
 “ upon such contravention, may take up their titles
 “ to the foresaid lands and others, by declarator,
 “ adjudication, or any other manner competent by
 “ law, without being liable to the contravener’s
 “ debts or deeds, but subject always to the whole
 “ clauses, prohibitory, irritant, and resolutive above-
 “ mentioned, &c.” In a subsequent part of the deed
 the entailer authorized “ *George Steel and Harriet*
 “ *Applin, or any other member of this entail,*” to
 apply to the Court to have it recorded.

Entail regis-
tered March
11, 1790.

The entail was registered on the 11th March, 1790, and the entailer died on 24th June, 1790. On his death, George Steel and Harriet Applin the conjunct fiars made up titles to the estate; and on

the 24th Nov. 1791, the institute, with the consent of Harriet Applin his wife, executed a trust-deed, whereby he gave, granted, assigned, and disposed the estate to Robert Steel his brother (father of Respondent Robert Steel) and three other persons, upon trust, to sell the same, and dispose of the money in payment of his debts and for other purposes; and he, by the same deed, appointed the trustees guardians to his children. The institute George Steel died on the 15th March, 1792, and the trustees on 25th Sept. 1792, exposed the estate to public sale at the upset price of 7000*l*. No offer was made at the auction; a circumstance ascribed by the Appellant (eldest son of the institute) to the generally received opinion that the title was defective, so that a public auction could afford no fair criterion of value. The estate was afterwards purchased, at the upset price, by private bargain, in trust for Robert Steel, one of the trustees to sell, and a guardian to the Appellant, who was then a minor. Robert Steel possessed till his death, and then it devolved on his eldest son Robert Steel the Respondent, who, in 1806, sold it to Robert Clark, writer in Perth, who again sold it to George Greenlaw, writer to the signet.

Robert George Steel, the son of the institute, after all these sales had taken place, raised an action of declarator of irritancy and reduction against the eldest son of the original purchaser, and against the subsequent purchasers, and surviving trustees, concluding to have it found and declared that the institute and his wife, by executing the trust-deed, had for-

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Institute ex-
ecutes a trust-
deed to sell
the estate.

Sale in trust
for Robert
Steel, one of
the trustees.

Subsequent
sales.

Action to set
aside the sales.

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Interlocutors,
July 6, Nov.
12, Dec. 3,
1813; Jan. 14,
1814.

Vide the in-
terlocutor at
length in the
Lord Chancel-
lor's speech,
post.

feited all right to the estate, and that it now be-
longed to the pursuer; and concluding also for re-
duction of the trust-deed, and subsequent transmis-
sions of the estate. Memorials on the merits having
been ordered and given in, the Lord Ordinary pro-
nounced an interlocutor, to which the Court ad-
hered, finding that the prohibitions in the entail
were not applicable to the institute or disponee, and
assoilzied the defenders, and decerned. From this
judgment the pursuer appealed.

The question was, whether the word *members*,
as used in the restrictive clauses of this entail, did
or did not comprehend the institute.

For the Appellant, it was argued that in the Dun-
treath case the House of Lords had determined that
the institute or disponee was not included in the
term *heir*, which technically implied in law the per-
son who takes by service, as distinguished from the
institute or fiar who takes by the dispositive part of
the deed. But here there was an essential distinc-
tion, because the prohibitory, irritant, and resolute
clauses were laid, not merely on the heirs, but also
on the *members* of tailzie; and in order to bring
this case within the principle of the Duntreath case,
it would be necessary to show that the term *heir* and
member were in law co-extensive and synonymous.
The contrary however was clear from the language
of conveyancers and the best institutional writers,
by whom the term *member* was used as including,
or applying to, the institute. That it was so used
by conveyancers appeared from the entails of Castle-
hill, recorded 29th June, 1711; Dumbarnie, 2d

July, 1712; Robroystown, 21st July, 1725; Glook, 27th January, 1731; Skelmorlie, 12th July, 1704; Tushielaw, 22d Jan. 1715; Lamington, 30th July, 1726, and others; and that it was so used by institutional writers appeared from the marginal note or title to the case of *Erskine v. Balfour Hay*, which is in these words “The *first member* of an entail “being a disponee is not bound by the restrictions “laid on the heirs of entail,” and this title being transcribed into the dictionary was sanctioned by the authority of Lord Kames. The authority of Sir G. Mackenzie was still more decisive; for he expressly laid down that the term *member* was a technical generic term, including the institute as well as the heir. His words were “The proprietor “tailzies his lands in Scotland in favour of a certain “person who is called the institute or *first member* “of tailzie; whom failing, to the rest that are “called substitutes. Institutes and substitutes being “terms borrowed from the civil law, and expressed “by us in the *first*, second, and third *member* of “tailzie.” It had been contended that in this entail the word *members* was a redundancy, and that the entailer meant no more by it than he did by the word *heirs*. But it was manifestly the entailer’s intention that the institute should be bound by the fetters, and the question was whether, though the word *heirs* was not sufficient, the word *members* was not large enough to comprise the institute. It was true the word *members* was employed in a passage of the Duntreath entail; but the reason why it had not there the effect of extending the restriction to the institute was, that the only clause in which

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the term occurred was one by which the efficacy of the entail could not be protected; the prohibitory irritant and resolute clauses being there directed solely against the *heirs*. But the present case was exactly the reverse; for though in some unimportant passages the word *member* was omitted, yet the prohibitory, irritant, and resolute clauses against selling, &c. applied to the *members* as well as heirs. The irritancy at the end of the fifth clause clearly applied not merely to the member of the sentence immediately preceding, but to the whole; and by the seventh or resolute clause the whole heirs and *members* were bound to observe *every one* of the clauses and articles before-mentioned, or to forfeit the right in case of contravention. It had been objected also that the restriction, in the third clause, was directed against “*members, &c. who shall succeed &c.*,” and that the institute was not a successor. But *succeed* applied to purchase as well as to descent, *ex gratia*, a singular successor. The only clause in which the restriction was directed against *heirs* only was that (the fourth) against altering the order of succession, which was not here in question; and by the seventh clause the whole heirs and *members* were bound to observe *every one* of the clauses and articles before-mentioned. In *Syme v. Dixon*, 1809, it was held that a resolute clause extended to the institute under the words *person or persons*: and fetters might be raised (in a way quite different from implication) by reference, as in the cases of *Lawrie v. Spalding*, 1764, and others. In the sixth clause the institute was particularly named; but the use of the word “other” there

showed that the entailer (if the intention were to be considered) understood him to be included in the general expression "*heirs and members.*" Here too the conditions and limitations came before the grant to the institute, and it was not so in the Duntreath case.

For the Respondents it was argued that the estate was sold twenty-five years ago by the institute without objection, under the opinion of the most eminent counsel. The principle was established in three cases before the Duntreath case, and in that case the Court of Session seemed to recede; but the House of Lords set it up again, and that was followed by seven cases decided on the same principle, which was now inflexible. The question was, not whether the entailer intended to include the institute, but whether he had expressly included him. The first point they insisted upon was that the word *member* strictly included the institute. Though that were made out, it would not be sufficient, for the word was not used in the irritant clause, and as this was a question between heirs, the strictest construction must be applied. Not one of the authorities mentioned, except the marginal note or title to the case of *Erskine v. Hay*, showed that the word *members* meant any thing further than the heirs of the entail. For the question still remained whether the institute was a member of entail. The entails referred to by them made the institute a member by including him expressly by name in the entail, or the same question might have arisen upon them as on this entail. Mackenzie spoke of the institute as the first member of entail, but that meant only that

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Ross (case of)
1742. Leslie,
(case of) 1752.
Erskine v.
Balfour, Hay,
Feb. 14, 1758.
Duntreath
case, Dec. 24,
1769.

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he was the first member, if so nominated. That observation did not apply to the note in *Erskine v. Hay*; but in the case itself there was no such expression as first member of entail, and the note was no good authority. There was no substantial distinction between this and the Duntreath case, unless it could be made out that there was a substantial difference between the words “ I dispone, under condition, to A. B.,” and “ I dispone to A. B. under condition.” Then followed the cases of Gordonstown, Wellwood, Marchioness of Titchfield, *Miller v. Scott*, *Menzies v. Menzies*, &c. Besides, there were parts of this entail from which it appeared that the entailer understood the institute in a sense different from that of heirs or members, as in the passage where he speaks of heirs or members who shall succeed, &c.; for though in a general sense *succeed* may apply to a purchaser or institute, yet technically it means one who is to inherit. Besides, in this entail, the irritant clause (sect. 5) must be confined to the last member of this long sentence. Still there was reason to believe that the entailer considered the institute as included; but the rule was clear; plain, and positive, that he must be expressly mentioned.

Mr. Leach (in reply). The Duntreath case was clear law, but the judgment of the House of Lords there was that the institute was not bound under the word heir. (*Lord Eldon, C.* The difficulty with me is how, if the institute was not comprised under the word *heir*, he could be fettered at all.) True, but it was there held that heir meant a person taking

by service and not as disponee. But what is the meaning of the term *member*? That had not been the subject of judicial controversy, and the works of lawyers and conveyancers on this subject were the best possible source of information; and when the Respondents said that these were no authority, they left the word without any meaning at all. But from the works of institutional writers and conveyancers it appeared that the word member applied to the institute not in a popular sense, but in legal technical language. The institute then being included in the word members, the prohibitory, irritant, and resolute clauses applied to him as well as to the other members, and the cases cited on the other side had no application to the present case.

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Mr. Leach and *Mr. Brougham* for the Appellants; *Sir S. Romilly* and *Mr. Adam* for the Respondent.

Lord Eldon (C.) As to the particular circumstance here that the purchase was made in trust for one of the trustees to sell, that is not made a ground of proceeding in this cause, and I give no opinion upon the case in that view of it: and then the question depends solely on the entail.

Judgment.
June 27, 1817.

Trustee to sell.

The *Duntreath* case has settled the point that entails are *strictissimi juris*, and that, whatever the intention of an entailer may be, fetters are not to be imposed by implication: and it is to be lamented that, after that point had been so settled in the *Duntreath* and other cases, a deed of entail, framed in 1790, should still have been made so as to leave

Duntreath
case.

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The ground of
decision in the
Duntreath
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to be shaken.

the matter in this situation, that, although a doubt can hardly be entertained that the entailer intended to include the institute or disponee, the intent has not been clearly and unequivocally expressed.

With respect to that case of Duntreath I have only two observations to make: 1st, that I was not a little startled at that decision; and, 2dly, that the decision having been once made, it must not now be shaken. But it is a very remarkable circumstance that in the Entail Act, 1685, there is no word under which the institute can be fettered at all, unless under the words *heirs* of tailzie; and yet it has been decided that if you fether the *heir* only, in the prohibitory, irritant, and resolute clauses; if in any of these clauses the word *heir* only is mentioned, the institute is not included in the fetters of the entail: and the question now is, whether the institute is fettered as a *member* of tailzie.

Now after it has been so often decided that the institute or disponee cannot be fettered by implication, that principle having been once solemnly settled, it ought not now to be got rid of by nice, thin, and shadowy distinctions. Having regard then to that principle, and to what, as Lord Kenyon expressed it, is to be found within the four corners of the instrument; we are to consider whether, if the entailer intended to fether the institute, he has clearly and unequivocally expressed that intention.

The interlocutor of the Lord Ordinary was this:—
“ The Lord Ordinary having considered the memo-
“ rial for Robert George Steel, pursuer, with the
“ counter-memorial for Robert Steel and other de-
“ fenders, and whole particulars, finds, 1st, that,

Not to be got
rid of by nice,
thin, and sha-
dowy distinc-
tions.

“ in 1790, George Steel disposed his lands, of
 “ Baldastard, to and in favour of himself in life-
 “ rent, for his life-rent use only; and to George
 “ Steel his nephew, and Harriet Applin his spouse,
 “ in conjunct fee and life-rent, &c. whereby the said
 “ George Steel, jun. became disponee or institute
 “ under the said deed: 2d, finds, that the procura-
 “ tory of resignation was granted in terms agree-
 “ ably to the above dispositive clause; but declared
 “ to be also under the conditions, provisions, &c.
 “ which are appointed to be inserted in the charters,
 “ sasines, &c. of the foresaid lands, in all time
 “ coming, and to be observed by all my *heirs and*
 “ *substitutes* above named, &c.

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There your Lordships observe, the words are—
 “ *all my heirs and substitutes*,” and though I do not
 say that an institute may not be included in the
 word *members* of tailzie; yet it must be clear that
 the entailer so intended it; and there he uses the
 words “ *heirs and substitutes*,” which has a ten-
 dency to show that he had in view, in this instru-
 ment, his heirs and substitutes only. “ 3dly, finds;
 “ that, by the fifth clause of the entail, it is de-
 “ clared, that it shall not be in the power of all or
 “ any of the said heirs, or members of tailzie, or
 “ other successors, to sell, dispone, wadset, &c. and
 “ the irritant clause, following this prohibitory clause,
 “ is directed against all debts, acts, and deeds of all
 “ or any of the said heirs of tailzie and substitu-
 “ tion, or their heirs.” Now it was very ably con-
 tended at the bar, and in a manner which might
 carry conviction to my mind, if I had not been
 obliged to guard it by the rules of law, and to give

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a *judicial* opinion, that the entailer meant that these prohibitions should extend not merely to the substitutes, but also to the institute: but I cannot in this instance apply that construction; for when the entailer says, “that it shall not be in the power of all or “any of the *said* heirs or members of tailzie, &c.” he seems to give the construction which he intended should be put upon these words, by the words which he uses in the previous part of the deed. “4thly, “finds that in the sixth clause of the entail, where “an annuity is granted to Ann Applin, the afore- “said George Steel, and Harriet Applin his spouse, “is contradistinguished to the other heirs and mem- “bers of tailzie.” There George Steel is named in contradistinction to other heirs and members; and as to the word *other*, that form of expression occurred and was argued upon in the Duntreath case: but the argument did not there prevail. “5thly, finds, “that under these circumstances the expressions in “the entail, of ‘heirs or members,’ and of ‘heirs and “‘members’ of tailzie, cannot be held to apply to “George Steel the disponee or institute; but that “the expressions ‘heirs or members,’ or ‘heirs “‘and members,’ must be held as synonymous “terms,” (that is, with *heirs and substitutes* mentioned in the first part of the deed); “and there- “fore, that in consequence of the principles ac- “knowledged in the cases of Duntreath and Well- “wood, and other decisions of the Court, the pro- “hibition against selling or executing other deeds, “contained in the foresaid entail, cannot be held “as applicable to the said George Steel as institute “or disponee, &c.”

Agreeing in these findings of the Lord Ordinary and the Court, I think the result under this instrument is such as they have found it to be; and it appears to me that other passages in this instrument lead to the same result. I propose therefore to find that, under the particular circumstances mentioned in the Lord Ordinary's interlocutor, and advertng also to the whole of the circumstances as they appear in this instrument (I am anxious to have these words introduced), the word *members*, as used in this deed, does not include the institute—and that the judgment should be affirmed.

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USED IN THIS
ENTAIL.

The word
members (of
entail), as
used in this
deed, does not
include the
institute.

Judgment AFFIRMED.

SCOTLAND.

APPEAL FROM THE COURT OF SESSION.

RITCHIE—*Appellant*.

MAGISTRATES OF CANONGATE and }
others } *Respondents*.

THE magistrates of Canongate, upon a certificate on oath by a physician, that the life of a debtor, confined in their gaol by the Appellant, was in imminent danger, permitted his liberation from the gaol to some house within the burgh, on his giving bonds with two sureties to conform to the conditions of the act of sederunt, 1671, by residing in some house within the burgh, and on no account going beyond the jurisdiction of the same, and returning to prison on recovery of his health, or when required, under penalty of paying the debt. A parti-

June 27,
1817.

LIABILITY OF
MAGISTRATES
IN CASES OF
LIBERATION
OF DEBTORS
UNDER ACT
OF SEDER-
UNT, 1671.