

[12th February 1838.]

Sir EVAN JOHN MURRAY MACGREGOR, Bart., and JOHN ATHOLL BANNATYNE MURRAY MACGREGOR his eldest Son, Appellants. — *Attorney General (Campbell) — Burge.*

JAMES BROWN, Respondent. — *Sir William Follett — Dr. Lushington.*

*Entail.*—An entailer disposed his lands to himself in life-rent, and to his son in fee, whom failing, to a series of substitute heirs of entail, and the irritant and resolute clauses provided, that if “the heirs descending of my body, or any of the other heirs of tailzie before mentioned shall contravene,” &c., “the person or persons so contravening shall forfeit,” &c.: Held (affirming the judgment of the Court of Session) that these words did not apply to the institute, although he was “an heir descending of the body” of the entailer; and the structure of the deed showed that the entailer considered the institute to be included under the term “heirs of entail.”

1ST DIVISION.  
 Ld. Corehouse. **B**Y disposition and deed of entail dated the 15th of March 1814, and by supplementary deed of entail dated the 21st May 1814, the late Sir John Murray Macgregor disposed to himself in life-rent, and to the appellant Evan John Macgregor Murray his son, and the heirs male of his body in fee, the lands of Laurick and other

lands, whom failing, to John Atholl Bannatyne Macgregor Murray his grandson, and a certain series of substitute heirs, including not only descendants of his own body, but also collateral relations. The deed contained, inter alia, the following clauses :—“ Second, That it shall  
 “ not be in the power of any of the heirs of entail,  
 “ hereby substituted to me to alter, innovate, or  
 “ change this present deed of tailzie, or other writ or  
 “ deed to be made by me, or order of succession hereby  
 “ prescribed, or which may therein be appointed, or to  
 “ do any act or deed that may import or infer any  
 “ alteration, innovation, or change thereof, directly  
 “ or indirectly; but with this exception always, that  
 “ in case any presumptive or apparent heir or heirs  
 “ who might succeed to the said lands and estates shall  
 “ be forfeited or attainted of treason, or misprision of  
 “ treason, or be under any other legal incapacity which  
 “ may exclude or disable him, her, or them from  
 “ taking, holding, and enjoying the said lands and  
 “ estates, then and in that case it shall be in the power  
 “ of any of the heirs of entail who have succeeded to  
 “ the said lands and estates, and shall be in the fee  
 “ thereof at the time, so often as such case shall happen  
 “ in all time coming, by a deed under his or her hand,  
 “ to renew this my entail in favour of him or herself,  
 “ and the other heirs called after them to the succes-  
 “ sion, according to the order before written, and  
 “ nomination to be granted by me, who shall be capable  
 “ to succeed, leaving out or passing by such apparent  
 “ or presumptive heir so rendered incapable by taking  
 “ and holding said lands and estates, in the same  
 “ manner as if such heirs were naturally dead, and to

MACGREGORS

v.

BROWN.

12th Feb. 1838.

MACGREGORS “ settle the said estates and succession upon himself,  
 v.  
 BROWN. “ herself, and the other substitutes who are under no  
 12th Feb. 1838. “ legal incapacity; but with and under the whole  
 “ burdens, conditions, restrictions, obligations, pro-  
 “ visions, declarations, exceptions, exclusions, and  
 “ clauses prohibitory, irritant, and resolute, herein  
 “ contained.”

“ Third, That it shall not be in the power of  
 “ the said Evan John Murray Macgregor, or John  
 “ Atholl Bannatyne Macgregor, or any of the other  
 “ heirs of tailzie substituted to me in manner fore-  
 “ said, who shall succeed to my said lands and estates,  
 “ to sell, alienate, wadset, impignorate, or dispone  
 “ the said lands and estates, or any part thereof,  
 “ either irredeemably or under reversion, onerously or  
 “ gratuitously, or to gift or dispose of the same, or to  
 “ grant securities affecting the same, or to burden the  
 “ said lands and estate, in whole or in part, with debts  
 “ or sums of money, infestments of annual rents, or  
 “ any other burden or servitude whatever, nor to con-  
 “ tract debts nor grant deeds, nor to incur the guilt of  
 “ treason or misprision of treason, nor, in short, to do  
 “ any act or deed, directly or indirectly, whether of  
 “ a public or private nature, whereby the said lands  
 “ or estates may be burdened, affected, forfeited,  
 “ escheated, or evicted from them in any manner of  
 “ way whatever, or this present tailzie, or course of  
 “ succession hereby described, in any shape prejudiced,  
 “ altered, or infringed.”

The irritant and resolute clauses of the entail were  
 in the following terms: “ And these presents are  
 “ granted by me with and under the irritances follow-

“ ing; viz., that in case the heirs descending of my  
 “ body, or any of the other heirs tailzie before men-  
 “ tioned, shall contravene any one of the particulars  
 “ above specified, that is, shall fail or neglect to obey  
 “ and perform the said conditions, provisions, and  
 “ obligations, or any of them, or shall burden the  
 “ estate, or any otherwise act contrary to or in con-  
 “ travention of the said restrictions, limitations, and  
 “ prohibitions, or any one of them, that then and in  
 “ any one of these cases not only all such acts, facts,  
 “ deeds, and debts contracted, done, or committed  
 “ contrary thereto, or to the true intent and meaning  
 “ thereof, with all that has followed or that may  
 “ follow thereon, shall be in themselves void and null  
 “ and of no avail, force, strength, or effect, at least  
 “ unavailable or ineffectual against the other heirs of  
 “ tailzie; and neither the lands and estates, and others  
 “ foresaid, nor any part thereof, shall be anyways  
 “ burdened or affected therewith, but shall be as free  
 “ and disengaged from the effects of all debts, deeds,  
 “ omissions, or commissions as if the same had never  
 “ been granted, contracted, done, or taken place; but  
 “ also the person or persons so contravening, by failing  
 “ to obey the said conditions, and implement said  
 “ obligations, or by acting contrary to the said limita-  
 “ tions and prohibitions, shall, ipso facto, amit, lose,  
 “ and forfeit all right, title, and interest, which he or  
 “ she hath to the said tailzied lands and estates, and  
 “ the same shall become void and extinct, and the  
 “ said tailzied lands shall devolve, accresce, and belong  
 “ to the next heir of tailzie appointed to succeed, al-  
 “ though descended of the contravener’s own body,

MACGREGORS  
 v.  
 BROWN.

12th Feb. 1838.

MACGREGORS “ in the same manner as if the contraveners were  
 v.  
 BROWN. “ naturally dead.”

12th Feb. 1838.

The deed also contained clauses enabling “ each of  
 “ the said whole heirs of entail above mentioned ” to  
 make provisions for spouses and younger children; also  
 power to the several heirs of tailzie who shall succeed “ to  
 “ make excambions on certain terms;” and it was also  
 specially provided and declared, “ that the said Evan  
 “ John Macgregor Murray, or John Atholl Bannatyne  
 “ Macgregor Murray, and the other heirs of tailzie  
 “ and provision, shall have power and are hereby autho-  
 “ rized to excamb the lands of Gart, either in whole or  
 “ in part, upon receiving an equivalent therefor in  
 “ lands more contiguous to my said estates, and the  
 “ difference in value, if any, in money; and in the  
 “ event of such excambion not taking place my said  
 “ heirs of tailzie shall be entitled and are hereby  
 “ authorized to sell the said lands of Gart,” &c.  
 Power was reserved to the entailer “ not only to  
 “ alter the said course of succession as to all the heirs  
 “ of tailzie before specified,” but to sell and burthen.

There was also a provision, that if the entailer died  
 without making up titles to all the lands in the entail it  
 should be obligatory on “ my heirs at law, and other  
 “ heirs,” to make up titles and denude themselves “ in  
 favour of “ the said heirs of tailzie.” And an obliga-  
 tion was imposed on “ the said Evan John Macgregor  
 “ Murray my son, and failing him, the said John Atholl  
 “ Bannatyne Macgregor Murray, and all the heirs of  
 “ tailzie,” to record the entail. The precept of sasine  
 directed infestment “ to be given and delivered to me  
 “ the said Evan John Macgregor Murray for myself in

“ life-rent, and to the said Evan John Bannatyne Mac-  
 “ gregor Murray in fee, and to the other heirs of tailzie  
 “ above mentioned, in the order before prescribed.”

MACGREGORS  
 v.  
 BROWN.

12th Feb. 1838.

Upon the death of Sir John Macgregor Murray, his son the appellant made up his titles, in 1823, as institute by charter following upon the procuratory in the original deed and supplementary deed of entail, and by sasine upon the charter.

On the 1st of October 1830 the appellant and two other persons bound themselves by their promissory note, conjunctly and severally, to pay to Mr. Michael Linning the sum of 5,000*l.* at the term of Lammas 1831. This note, having been indorsed by Mr. Linning to Sir William Forbes and Company, was protested at their instance for non-payment; and some time afterwards it was assigned with the registered instrument of protest in favour of the respondent Mr. James Brown, accountant in Edinburgh.

In order to effect payment of the debt Mr. Brown, on the 2d of October 1834, raised an action against the appellant, concluding for adjudication of such parts of the lands included in the entail as should be sufficient to pay the debt with interest. In defence the appellant pleaded that he held the lands under a strict entail, and that the adjudication must be subject to the provisions and fetters of that entail, so as not to occasion any contravention of it in the appellant's person. Appearance was also made for John Atholl Bannatyne Murray Macgregor, Esq., eldest son of the appellant, and the party substituted next in order to him in the entail, and he adhered to the defence set up by his father.

MACGREGORS  
 v.  
 BROWN.  
 12th Feb. 1838.

The Lord Ordinary, on the 12th November 1835, repelled the defences, decerned in terms of the libel, and found the respondent entitled to expenses; and issued this Note:—“ It appears to the Lord Ordinary  
 “ perfectly clear that there is no prohibition in this entail  
 “ against altering the order of succession, effectually  
 “ imposed on Sir Evan John Murray Macgregor, the  
 “ institute. There is a very careful and anxious clause  
 “ against alteration and innovation, and all acts and  
 “ deeds directly or indirectly importing them, but that  
 “ clause is expressly limited to the heirs of entail sub-  
 “ stituted to the maker, and, therefore, as is admitted,  
 “ it cannot bind the institute.

“ A second prohibition is directed against alienating,  
 “ burdening, contracting debt, and committing treason  
 “ or misprision of treason, and of the acts and deeds  
 “ of that nature a special and detailed enumeration is  
 “ given. Then follows a general clause, professing to  
 “ be a summary or abridgement of that special enume-  
 “ ration: ‘ nor, in short, to do any act or deed by  
 “ ‘ which the lands may be burdened, affected, &c., or  
 “ ‘ this present tailzie or course of succession preju-  
 “ ‘ diced, altered, or infringed.’ Now, there is no  
 “ rule of law better established than that laid down  
 “ by Mr. Erskine, namely, that in all deeds and instru-  
 “ ments whatever a general clause following a par-  
 “ ticular enumeration is not to be extended further  
 “ than the particulars enumerated. Therefore, it is  
 “ certain, that the general clause at the end of the  
 “ second prohibition must be restricted to deeds of  
 “ alienation, debts, and crimes, and cannot include  
 “ the acts which form the subject of the first prohibi-

“ tion. The second prohibition, therefore, though  
 “ directed against the institute, as well as the heirs,  
 “ cannot supply the defect which exists in the first.  
 “ It is this rule of law that distinguishes the present  
 “ case from that of Roxburghe and others, in which  
 “ clauses expressed in general terms, but not preceded  
 “ by special enumerations, were found to have a more  
 “ extensive operation, and to render effectual the  
 “ entails in which they occurred.

MACGREGORS  
 v.  
 BROWN.  
 12th Feb. 1838.

“ The irritant and resolute clause appears to be  
 “ exposed to the same fatal objection of not being  
 “ expressly directed against the institute. It provides,  
 “ that in case ‘ the heirs descending of my body, or  
 “ ‘ any of the other heirs of tailzie before mentioned,  
 “ ‘ shall contravene the prohibition, the acts of con-  
 “ ‘ travention shall be null, and the contravener shall  
 “ ‘ forfeit his right.’ The defenders maintain that as  
 “ the institute, though not an heir of tailzie, is an heir  
 “ descending of the entailer’s body, the clause is suffi-  
 “ ciently broad to comprehend him ; but in that argu-  
 “ ment the principle is overlooked, that while the  
 “ construction to support the fetters of an entail must  
 “ be of the strictest nature, the construction to break  
 “ the fetters is directly the reverse. In the former,  
 “ no aid can be obtained from inference or presumed  
 “ intention ; in the latter, these are the sources from  
 “ which the meaning of the words used may and ought  
 “ to be collected.

“ By the clause of destination the estate is conveyed  
 “ to heirs of two descriptions, one being heirs de-  
 “ scending of the entailer’s body, and the other, heirs  
 “ not descending of his body, but both, by virtue of



MACGREGORS

v.

BROWN.

12th Feb. 1898.

“ the conveyance, heirs of entail. It is plain that the  
 “ irritant and resolute clause is directed against both  
 “ descriptions of heirs, and against them exclusively;  
 “ it has no application to persons not being heirs of  
 “ the entail, though heirs of the entailer’s body. It is  
 “ very true that the entailer intended to fetter the  
 “ institute as well as the heirs of entail, but he at-  
 “ tempted to do so under the erroneous belief that  
 “ the institute was an heir of entail, as is evidently  
 “ demonstrated by a long series of provisions in the  
 “ deed, and more especially by the clause relative to  
 “ the cutting of timber. It is thought, therefore, to  
 “ be contrary to the established rule of interpretation  
 “ to hold the words ‘heirs descending of the body’  
 “ in this clause as importing heirs of line, heirs of  
 “ conquest, heirs in mobilibus, or any description of  
 “ heirs, except heirs of entail, of whom alone there was  
 “ any question in this deed: and, if that be so, the  
 “ present case becomes identical with that of Dun-  
 “ treath, and a numerous series of precedents to the  
 “ same effect. On this point the case of Dougaldston  
 “ on the one hand, and that of Baldastard on the  
 “ other, afford an apt illustration. A person contra-  
 “ vening in the one case, and a member of tailzie  
 “ contravening in the other, are both terms in them-  
 “ selves sufficiently comprehensive to include the  
 “ institute as well as the heirs. But in the case of  
 “ Dougaldston there was nothing in the context to  
 “ limit the term person, so as to exclude the institute,  
 “ whereas in the case of Baldastard it appeared by  
 “ reasonable inference, from a comparison of various  
 “ clauses, and from the whole structure of the deed,

“ that the term ‘members of tailzie’ was employed  
 “ to denote heirs being members of tailzie. But the  
 “ inference in this case is much clearer than in that  
 “ of Baldastard; for it is undeniable, 1st, that Sir  
 “ John Murray Macgregor, in the clause in question,  
 “ had no heirs in contemplation but heirs of entail;  
 “ and 2dly, that he conceived his son, Evan John, to  
 “ be an heir of entail. The Lord Ordinary is aware  
 “ that an opinion in the case of Bauch v. Murray, to  
 “ which the highest respect is due, is opposed to what  
 “ is now stated; but he cannot acquiesce in that view.  
 “ The case of Baldastard shows that it is not enough  
 “ that the entailer should have intended to fetter the  
 “ institute, and that he made use of a term which, in  
 “ one view, is large enough to include him, if it is  
 “ clear from inference that he used that term in a  
 “ different sense, and one totally inapplicable to the  
 “ institute. The case of Bauch cannot be regarded  
 “ as a precedent here, as the decision of the Inner  
 “ House rests on a separate and unexceptionable  
 “ ground.”

MACGREGORS  
 v.  
 BROWN.  
 —  
 12th Feb. 1838.

The appellants reclaimed to the First Division of the  
 Court, who ordered Cases to be laid before the whole  
 judges with a view to determine the following ques-  
 tions:—“ Whether the interlocutor of Lord Core-  
 “ house, Ordinary, ought to be adhered to on both  
 “ or either of the grounds, that in the entail founded  
 “ on by the defender there is no prohibition against  
 “ altering the order of succession, and that the irritant  
 “ and resolute clause of that entail is not applicable  
 “ to the institute; or on any other grounds? or,  
 “ Whether the said interlocutor ought to be altered,

MACGREGORS “ and if altered what judgment ought to be pronounced  
 v. “ in place thereof?”<sup>1</sup>  
 BROWN.

12th Feb. 1838.

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<sup>1</sup> The following are the opinions delivered by the consulted judges.

*Lords Justice-Clerk, Meadowbank, Fullerton, Moncreiff, Jeffrey, Cockburn, and Cuninghame.*—“ This is an action by the pursuer for adjudging  
 “ the lands mentioned in the summons, for a debt due to him by Sir  
 “ Evan Macgregor, the proprietor in the fee of those lands. The defence  
 “ stated for Sir Evan Macgregor, and for his eldest son as the next heir  
 “ of entail is, that the estate is possessed by Sir Evan solely by virtue  
 “ of a strict entail, whereby he is effectually restrained from contracting  
 “ debts for which the estate may be adjudged, under the pain of irritancy  
 “ or forfeiture, and all such debts are declared to be null and void, and  
 “ adjudication for payment of them is declared to be incompetent.

“ The interlocutor of the Lord Ordinary, in general terms, repels the  
 “ defences, and decerns in terms of the libel. And the material question  
 “ now before the Court, and on which our opinion is required, is,  
 “ whether that interlocutor ought to be adhered to, or altered.

“ From the pleadings of the parties, and the note of the Lord Ordinary,  
 “ it appears that three points of law may be involved in this  
 “ question. The pursuer maintains, that the entail founded on is  
 “ essentially defective in two respects, in so far as it can be stated to  
 “ have relation to the acts and deeds of Sir Evan Macgregor, the proprietor  
 “ in the fee; 1. Because it contains no clause prohibiting him,  
 “ as institute, from altering the order of succession; and, 2. Because the  
 “ irritant and resolute clauses are not so conceived as to apply to him  
 “ as the institute or disponent, but apply only to heirs of entail.

“ If the first of these points were established, it would constitute a  
 “ very serious defect in the entail. But, in order to render the objection  
 “ effectual to sustain the present action of adjudication, it requires  
 “ that the Court should determine a third question, of more general and  
 “ abstract law, viz., whether an entail which does not contain an effectual  
 “ prohibition against altering the order of succession can be of any effect  
 “ at all, even in those points in which it might be found to be in other  
 “ respects technically correct and sufficient. The second objection taken  
 “ to the sufficiency of the entail, if well founded, is at once decisive  
 “ against the grounds of defence to the present action. For this is a  
 “ question with onerous creditors proceeding to adjudge the estate for  
 “ payment of their debts contracted by the proprietor in the fee. And  
 “ the law has been long and well settled, that, unless the prohibitions of  
 “ the entail, whether against selling or against contracting debts, are  
 “ duly fortified, both by an irritant clause declaring the deeds done in  
 “ contravention of them to be null and void, and by a resolute clause  
 “ declaring that the party contravening shall forfeit all right to the estate,  
 “ and unless these clauses are so expressed as to comprehend the acts of

The Court (11th March 1837), on advising the Cases and the opinions of the consulted judges, adhered

MACGREGORS  
v.  
BROWN.

12th Feb. 1838.

“ the individual whose acts or deeds are objected to as contraventions,  
“ they can be of no effect at all against the rights or the diligence of  
“ onerous creditors or purchasers.

“ We therefore think it proper, in answer to the question, whether  
“ the Lord Ordinary’s interlocutor ought to be adhered to or altered,  
“ to direct our attention, in the first place, to this last point, viz.,  
“ whether the irritant and resolute clauses are effectual against the  
“ acts and deeds of Sir Evan Macgregor in the present case? And we  
“ are of opinion, that they are not sufficient.

“ By the conception of the deed of entail it is quite clear, that the  
“ estate is given to Sir Evan Macgregor directly as disponee or fiar, and  
“ not as an heir or an heir of tailzie. The entailer disposes ‘ to myself  
“ ‘ in life-rent, during all the days of my life, and to Evan John Mac-  
“ ‘ gregor Murray,’ &c. ; whom failing, &c. &c. in fee. And, after the  
“ cases of Wellwood, February 23, 1791; the Marchioness of Titchfield  
“ v. Cuming, May 22, 1798; Miller v. Cathcart, February 12, 1799,  
“ and other cases, there can be no doubt that these words constituted  
“ Sir Evan the disponee, or institute, and not an heir of tailzie.

“ This being clear, the question, whether he is effectually put under  
“ all the fetters and irritancies, depends on principles which have been  
“ firmly settled ever since the decision of the House of Lords in the  
“ case of Edmonstone of Duntreath. It is unnecessary to go into the  
“ particulars of that well known case. The general rule laid down by  
“ it is, that prohibitions or irritancies applied only to heirs of tailzie  
“ do not affect the institute, however clear it may be, from other clauses  
“ of the deed, or the general conception of it, that the entailer intended  
“ to include the institute in the operation of the clauses. This rests on  
“ the broad principle, that all such clauses are of the strictest construc-  
“ tion, and therefore cannot be extended, by any implication of intention,  
“ either to persons or to cases not expressly comprehended in them.  
“ And this has been held so decidedly, that even words introduced  
“ incidentally into the clauses themselves, which might seem to indicate  
“ such an intention, or the use of words of an ambiguous nature, have  
“ been always held not to be sufficient.

“ The general rule had been decided in two cases before the case of  
“ Duntreath. But that important judgment has been followed by very  
“ many cases, throughout which there has never for a moment been any  
“ departure from the principle. Nice cases have arisen, in the question  
“ whether the party was institute or heir of tailzie, such as Wellwood,  
“ M’Culloch, &c. And nice cases have also arisen on the question,  
“ whether special and express words used did apply to the institute or  
“ not. But no doubt has ever existed, that if the party were clearly

MACGREGORS to the interlocutor, except as to expenses; and of new  
 v. adjudged in terms of the libel.<sup>1</sup>  
 BROWN.

12th Feb. 1838.

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“ institute, and if the clause in question were not applied to him as  
 “ institute, but applied to the heirs of tailzie, no words merely indicating  
 “ that the entailer may have considered him as an heir of tailzie, and in  
 “ that view intended him to be bound, will render the clause effectual  
 “ against him. It is needless to go through the detail of all the cases.  
 “ It is impossible to read the case of Wellwood, or the case of Titchfield,  
 “ or the case of Miller v. Cathcart, or the case of Baldastard, without  
 “ seeing that, if any implication of intention would have done, the en-  
 “ tailer had indicated, in one and all of them, that he meant the institute  
 “ to be bound, and considered him as an heir of tailzie as much as the  
 “ substitutes named. But the principle of strict construction necessarily  
 “ carried with it another rule, that the most liberal construction must be  
 “ given in favour of liberty, so that any ambiguous words or loose ex-  
 “ pressions, even introduced into the clauses, shall not be accepted instead  
 “ of the direct words proper for imposing the fetters on the institute.  
 “ For example, in the entail of Gordonstone, the prohibition was, that it  
 “ should not be lawful ‘ to the heirs of tailzie above designed, male or  
 “ ‘ female, nor to the heirs who shall happen to succeed to the lands and  
 “ ‘ dignity,’ to do any of the prohibited acts, ‘ it being always understood,  
 “ ‘ that although the before-named persons be designed heirs of tailzie,  
 “ ‘ and be to succeed to my said estate as such,’ yet they shall have no  
 “ greater powers than life-renters. The institute in that case was an heir  
 “ of the entailer, and did succeed to the lands and dignity. But, in that  
 “ entail, he was not an heir, but disponee; and the restraining clauses  
 “ being applied to heirs of tailzie, it was found that he was not bound by  
 “ them.

“ So also in the case of Miller v. Cathcart, James Taylor, the institute,  
 “ was named in many of the clauses as ‘ James Taylor and all the other  
 “ ‘ heirs of entail,’ and in one clause it was said expressly, ‘ notwithstand-  
 “ ‘ ing the before written conditions, limitations, and restrictions put  
 “ ‘ upon the said James Taylor and the other before-mentioned heirs of  
 “ ‘ entail,’ &c., power was given to the said heirs to do certain things.  
 “ But the restraining, and irritant, and resolute clauses themselves were  
 “ applied to heirs of tailzie; and it was therefore found ‘ that the said  
 “ ‘ James Cathcart Taylor, being institute in the entail, was not affected  
 “ ‘ by the fetters thereof;’ and, therefore, that the entail could not be  
 “ pleaded in bar of payment of his debts.

“ The case of Baldastard was an extremely strong case, and particu-  
 “ larly illustrative of the principle, that even the use of words in the

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<sup>1</sup> 15 D., B., & M., p. 849.

Sir Evan Macgregor and his son appealed.

MACGREGORS  
v.  
BROWN.

*Appellants.*—In the entail there is a clear and valid

12th Feb. 1838.

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“ disputed clause itself, which in some sense might include the institute,  
 “ cannot be construed to have that effect if it appears from the con-  
 “ nection in which they stand that they were merely used as a form of  
 “ describing the heirs of tailzie. ‘Heirs and members of tailzie’ might  
 “ in a popular sense comprehend the institute; but it was held, both here  
 “ and in the House of Lords, that the word ‘members’ was limited by  
 “ the connection in which it stood with ‘heirs,’ and therefore could not  
 “ be taken as importing more than ‘heirs’ ‘being members’ of tailzie,  
 “ and describing persons who were ‘members’ because they were  
 “ ‘heirs.’

“ The few cases in which the institute has been found to be bound  
 “ are cases in which the words employed, not only did directly apply to  
 “ the institute, but could not, from the form in which they were used,  
 “ admit of any other construction. So it was in the case of *Syme v.*  
 “ *Ranaldson Dickson*, February 27, 1799, although that was certainly  
 “ a nice case upon the resolute clause. But, while the prohibitions  
 “ were expressly laid on the institute by name, the commencement of the  
 “ irritant and resolute clauses expressly included him, running thus,—  
 “ ‘in case my said son, or any of the heirs of tailzie, &c. should con-  
 “ ‘travene, the deeds should be null, and the person or persons, heirs  
 “ ‘of tailzie foresaid, so contravening,’ &c. should forfeit. The case  
 “ turned on the word ‘person’ in the singular number, which was held to  
 “ stand apart from the words following it, and, in this view, necessarily  
 “ to relate to the institute, the son, and to no one else. The late case  
 “ of *Dougaldston* was perhaps clearer, though also not decided without  
 “ difficulty. For the irritant and resolute clauses provided, that ‘in  
 “ ‘case the said Henry Glassford, or any of the heirs tailzie and pro-  
 “ ‘vision substituted to him,’ should contravene, not only the deeds  
 “ should be null, ‘but also each and every heir or person so contravening,’  
 “ should forfeit. The majority of the Court who decided that case held,  
 “ that, from the context, it was impossible that the word ‘person’ could  
 “ apply to any other person but Henry Glassford, the institute named in  
 “ the beginning of the clause.

“ The ruling principle, however, was again recognised in the case of  
 “ *Lord Elibank v. Murray*, July 2, 1833. Another case of importance  
 “ was, indeed, decided on the same day, in which the Court, resting on a  
 “ general clause, which was thought to express a positive intention that  
 “ the whole clauses should be binding on William Morehead the insti-  
 “ tute, came to an opposite conclusion. But the House of Lords, even  
 “ in that strong case, looking simply at the terms of the clause itself,  
 “ which in its commencement was directed against heirs of tailzie alone,  
 “ found that it did not reach the institute.

MACGREGORS  
v.  
BROWN.

prohibitory clause applicable to the institute, and showing an intention on the entailer's part to place

12th Feb. 1838.

“ We are aware, that the decision in the case of Baugh v. Murray, January 14, 1834, may seem to have involved a question of a somewhat similar nature with that which is now before the Court. But that case was taken up as a very special case. The judges were not agreed upon it; and while it does not appear from the report that the decisions on the subject were brought fully before them, there seems to have been an impression, that in the shape of the cause the Court were not under the necessity of deciding any point, except that nothing had been done to make the provision effectual against the entailed estate. At any rate, upon full consideration, we cannot hold that case to regulate the decision of the present case.

“ Attending to the principles of the law universally recognised, and to the whole course of the decisions, we are of opinion that the irritant and resolute clauses in the present case cannot be held to affect the institute. The prohibitory clause against selling or contracting debt, no doubt, applies to him nominatim, as it did in several of the cases which have been referred to, and very remarkably in the case of Morehead. But the irritant and resolute clauses are very differently constructed. They run thus: ‘ That in case the heirs descending of my body, or any of the other heirs of tailzie before mentioned, shall contravene,’ &c., not only the deeds shall be null, and the estate shall not be affected by them, ‘ but also the person or persons so contravening ’ shall forfeit all right, &c. It is perfectly clear that, unless the first words of these two clauses shall be held to comprehend the institute, there is neither a good irritant, nor a good resolute clause. For, independently of other cases, the same word ‘ person ’ was used in the resolute clause in the case of Morehead, and was found to be of no effect under much more difficult circumstances. It clearly would have been so found by the Court, but for the general clause, which alone raised the difficulty. But the first question here is, whether there is a good irritant clause, any defect in which is alone sufficient to support the judgment of the Lord Ordinary. If the words had run simply, ‘ In case any of the heirs of tailzie shall contravene,’ the case would have been identical with Morehead in this point, without the difficulty of it; and there could have been no doubt of it. The only question is, whether, attending to the strict principle of the law, the prefixed words, in the connection in which they stand, can be held to alter the construction: ‘ That, in case the heirs descending of my body, or any of the other heirs of tailzie before mentioned,’ &c. It is apparent that the words, ‘ the heirs descending of my body,’ do not specially describe the institute. They describe a class of heirs belonging to this entail; for the case stated is that of the heirs con-

the institute under the same restrictions as the heirs of entail.

MACGREGORS  
v.  
BROWN.

12th Feb. 1838.

“travening the entail. They have no reference to general descent by natural birth, or succession at common law, but have a special application to the matter of this entail, and nothing else. Yet it is of heirs only that the entailer speaks—of heirs, no doubt, descending of his body, but of these heirs as heirs of tailzie, contradistinguished from the other heirs of tailzie called. There might be numerous classes of heirs of tailzie descending of the entailer’s body, who are within the destination; and there might also be numerous classes of heirs of tailzie not descending of his body, within it. And what he says is, that, if the heirs descending of his body, or any of the other heirs of tailzie before mentioned, shall contravene, the nullity and forfeiture shall take place.

“We are of opinion, that, in consistency with the principles which have been held in all the cases since Duntreath, the words ‘the heirs descending of my body,’ can only be construed to mean such heirs of his body as were heirs of entail, and so might be distinguished from the other heirs of tailzie. And it appears to us, that to construe the term ‘heirs’ in this entail as specifically designating the institute, merely because he is in fact an heir of the entailer’s body, would not be reconcileable with the principles on which so many previous cases have been determined. He is not an heir in this entail. He does not take the estate by service as an heir; and though a description here given of other persons who are heirs, and who are also heirs of tailzie, might comprehend him in a natural sense, it does not at all comprehend him in any relation to the right or the character by which he has taken and possesses the estate in question.

“Having come to a decided opinion, that the irritant and resolute clauses do not affect Sir Evan M’Gregor, and therefore that the entail cannot be pleaded against the debts contracted by him, or the diligence of his creditors, we do not think it necessary to decide also on the objection taken, that there is no sufficient clause against altering the order of succession, or on the abstract question raised as to the effect of that objection in the present action, supposing it to be well founded. On the ground which we have fully explained, we are of opinion, that the pursuer is entitled to decree in his action, and that the interlocutor of the Lord Ordinary ought to be adhered to.”

*Lord Glenlee.*—“Although I cannot take it upon me to dissent from the foregoing opinion, yet it is not without great hesitation that I concur in it; because I doubt very much whether the principle which governed the Duntreath case, and various others, can justly be applied to this individual case.

“I understand very well, that if the tailzie applies the irritancies to persons described by an established and known technical designation,



MACGREGORS  
v.  
BROWN.

In the irritant and resolute clauses introduced in relation to the prohibitory clause, and intended to

12th Feb 1838.

“ we are not by implication to consider any person as included in the  
“ designation, other than those which fall under it according to its  
“ proper technical meaning. But if the tailzie does not apply the  
“ irritancies to a description of persons so worded, as in itself, and without  
“ interpretation, to point out clearly who they are, and if we are at all  
“ obliged to find out this by implication and presumptions of intention,  
“ it ought to be *tota lege perspecta*, that we form our judgment on the  
“ matter.

“ Now, the irritant clause in this case is not directed simply against  
“ ‘ any of the heirs of tailzie,’ but against ‘ any of the heirs of tailzie  
“ ‘ before mentioned,’ which throws us back to the prohibitory clause.

“ The first prohibition, which is against alienations, &c. &c., is directed  
“ against the institute, and first substitute nominatim, and the ‘ other  
“ ‘ heirs of tailzie substituted to me in manner foresaid, and succeeding  
“ ‘ to my said lands.’

“ The remaining prohibitions appear to be directed against the heirs  
“ of tailzie as above described, that is, the ‘ heirs of tailzie substituted to  
“ ‘ the maker of the entail.’ Now, as there is not, technically speaking,  
“ any person in the whole tailzie who is an heir substituted to the maker  
“ of the entail, we are forced, from implication and presumption, to in-  
“ terpret his meaning; and I do not see why, considering his peculiar  
“ mode of expression, we are to confine that meaning to heirs of tailzie,  
“ properly so called, and not to include, as he himself evidently intended,  
“ the institute as well as them; and, in short, as signifying the whole  
“ persons called to the succession.”

(Lord Medwyn, being interested in the cause, gave no opinion.)

*Notes of the opinions of the Judges of the First Division of the Court.*

*Lord Mackenzie.*—I have read the opinions of the consulted judges with great care, and although my own opinion in this case is greatly shaken, yet I am not able to say I have changed it, nor can I adopt the opinion that has been given by the consulted judges. I shall express my views, however, very briefly.

The entailer calls all his descendants, beginning with his eldest son, going through his younger sons, and ending with, ‘ whom all failing, ‘ the heirs whatsoever of my body.’ He then, in the irritant clause, applies the irritancy first to the ‘ heirs descending of my body.’ That expression, if taken by itself, is quite sufficient to include and express the institute. It means clearly all persons being his heirs by descent from his body,—that is, all his descendants. It is void of ambiguity or technical difficulty. How then do you limit it? By adding to it the words, ‘ or other heirs of entail,’ and then applying to the clause a

fence it, the language used is not, as in the Duntreath case, of a limited character, technically excluding the institute, but the leading class of persons named are the heirs descending of the granter's body generally, a description sufficient to comprehend naturally and accurately the institute of the entail, being as he is the granter's immediate descendant, and only son and heir, and a description legally and properly comprehending that person, unless upon other sufficient grounds he appear to be excluded from it.

MACGREGORS  
v.  
BROWN.

12th Feb. 1838.

In considering whether the institute, being the entail's son and heir, is excluded from this applicable and comprehensive description, it lies with the respondent to make out that exclusion, and it is not sufficient for that purpose to raise verbal conjectures as to possible or probable inaccuracies into which the

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sort of interpretation that I think is here used for the first time. In the first place, by the strict verbal reading of the Duntreath case, rejecting inference, you take the words 'heirs of entail' as standing alone, and so hold that expression to exclude the institute. Then, secondly, you have recourse to free construction, and by inference from the words 'or other heirs of entail,' you conclude that the entailor, in using the words 'heirs descending of my body,' meant only heirs of entail, and so you arrive at a conclusion in certain defeasance of the entailor's true meaning. Now, I am not able to adopt this kind of what I may call double-dealing interpretation, applying both rigid verbal interpretation, and free interpretation by inference to the same sentence. I know of no example of this. The Duntreath case, and the cases following it, afford none. I think you may interpret, word by word, as in these cases, rejecting inference and explanation of one word by another; but you cannot, at the same moment, adopt inference from the very words which you have, by rejection of inference, interpreted in a way contrary to the entailor's meaning. Perhaps, it would be sufficient to say, that if you adopt free construction at all, you must look to the entailor's true meaning, and nothing else, and cannot defeat that meaning by free interpretation of any kind.

Lords President, Gillies, and Corehouse, expressed their concurrence in the opinions of the consulted judges.

MACGREGORS  
v.  
BROWN.

12th Feb. 1838.

entailer might have fallen in using more ample expressions, but the only question is, whether in connection with all the material parts of the deed, it was the entailer's intention and purpose so to exclude his son from the application of the phrase in question?

There are no sufficient grounds for holding that the entailer did mean to exclude his son from the class of persons described as 'the heirs descending from his body;' but, on the contrary there are grounds for holding that he intended to include him in that class; and the generality of the phrase used being unrestrained by any opposite intention in the entailer's mind, and indeed supported by that intention, must receive its full legal effect and interpretation.

Thus, there being a sufficient prohibitory clause directed specially against the institute, and sufficient irritant and resolute clauses to include the institute, the entail is effectual in all essential parts, and more especially as a restraint upon selling and contracting debt, and cannot be defeated by the respondent's diligence.<sup>1</sup>

*Respondent.*—If there be any one principle which can now be regarded as firmly and authoritatively settled in the law of Scotland, it is that of strict construction in the matter of entails. The law does not, as in the

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<sup>1</sup>*Authorities.*—Edmonstone, 24th Nov. 1769, (4409) reversed 16th April 1770; Leslie, 1752, Elch. v. Taillie, No. 49; Erskine, 14th Feb. 1755 (4406), L. Elibank, 2d July 1833, 11 S., D., & B., p. 858, affirmed 19th March 1835, 1 S. & M. Appeal Cases 1; Morehead, 2d July 1833, 11 S., D., & B., p. 863, reversed 31st March 1835 (1 S. & M. Appeal Cases, p. 29); Dick, 14th Jan. 1812, F. C.; Bruce, 15th Jan. 1799 (15539); Barclay, 18th May 1821 (1 Shaw, Appeal Cases, No. 8.)

interpretation of wills and other more favoured instruments, lend itself to aid the granter's purposes, by gathering his intention from a view of the general scope and tenor of his whole deed, so as to supply by presumption or implication, any thing not appearing on the face of it in direct, clear, and unambiguous language. On the contrary, the law rejects all presumption, however strong, and allows no restrictions to be created or extended by way of inference, whether as regards the particular acts which form the subject of the prohibitions, or the persons on whom the fetters are to be imposed. In every case where a man has made an entail "for the maintenance and preservation" of his name and family," which is the usual inductive cause of such settlements, providing his estate, to a number of persons in succession, under prohibition to sell or contract debt, or alter the investiture, and with irritant and resolute clauses framed for the protection of these prohibitions, the plain presumption, in the absence of any express declaration to the contrary, will of course be that he has intended the restrictions to apply to every one of the prohibited acts, and to be binding on all and each of the parties included in the destination. If this view of the law be correct, the present entail cannot be pleaded against the debts and deeds of the appellant, who is the institute or first disponee; because the irritant and resolute clauses, which are essentially necessary for enforcing the prohibitions, are not so expressed so as to reach or affect him.

The terms used in the present case are not precisely identical with those which occurred in the case of Duntreath, and no question has yet been tried as to

MACGREGORS  
v.  
BROWN.

12th Feb. 1838.

MACGREGORS  
v.  
BROWN.

12th Feb. 1838.

the effect of a clause conceived in the exact form of words which the entailer has here employed; and an examination of some of the leading decisions will be sufficient to show the complete identity of this case, in principle, with all those in which it has been found that the institute is not affected by the fetters when they are in terms imposed solely upon the heirs.

The point established by these cases is, that restrictions directed exclusively against the heirs do not affect the institute, because in a proper legal sense the institute is not an heir, but a disponee, who takes as singular successor of the granter, while the heirs require the intervention of a service in order to complete their title. The rule founded upon this distinction has been uniformly applied, even where it has been clear, as indeed in almost every case it has been, that the entailer, in imposing fetters upon the heirs, truly meant to include the institute, erroneously supposing him to be one of that class of persons. It matters not though the entailer may have spoken of the institute in conjunction with the heirs of entail, in such a way as to show that he was not aware of any difference in their legal characters, and consequently to leave the irresistible inference, that when he laid restraints upon the heirs he intended, under that designation, to restrain all the persons called to his succession, whether as heirs or disponees.<sup>1</sup>

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<sup>1</sup> *Authorities*—Leslie v. Leslies, 24th July and 5th Dec. 1752; Elchies, Tailzie, No. 49; Erskine v. Hay Balfour, 14th Feb. 1758, Mor. 4406; Wellwoods v. Wellwoods, 14th Feb. 1791, Mor. 15463; Gordon v. M'Culloch, 24th Feb. 1791, Bell, p. 180; Mackenzie v. Mackenzie, 24th Nov. 1818, Fac. Coll.; Gordon v. Lindsay Hay, 8th July 1799,

But this is not all. The objection to the irritant clause stands upon much higher and stronger grounds than any which can be derived from a mere view of the entailor's intention. Assuming, but not admitting, that he intended the expression "heirs descending from my body" to have a special application to the institute, and to all his other descendants, in their character of his legal representatives merely, and without any reference to their situation under the entail, still it is denied that these words can have the effect of binding the institute. For the term "heir" is one of a very flexible nature, having a variety of different meanings according to the circumstances in which it is used. It signifies at one time the heir of line or most general representative, at another the heir of conquest; in the case of a personal succession it denotes the executor or heir in mobilibus; but in the language of an entail it can be applied to no other parties except those who are called by the destination to succeed after the institute or disponee. It is in consequence of the fixed and unalterable signification thus attached to the term of entails, that the institute is never, in the construction of deeds of that description, held to be affected by fetters imposed only upon heirs. However plainly the granter may have evinced his intention to bind him simply as an heir, he cannot

MACGREGORS  
v.  
BROWN  
12th Feb. 1838

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Mor. 15462, Ap. 1, Tailzie, No. 2; Marchioness of Tichfield v. Cumming, 22d May 1798, Mor. 15467; Miller v. Cathcart, 12th Feb. 1799, Mor. 15471; Steel v. Steel, 12th May 1814, Fac. Coll., affirmed 24th June 1817, Dow's App. vol. v. p. 83; Murray v. L. Elibank, 19th March 1835, (1 S. & M. App. C.); Morehead v. Morehead, 31st March 1835, 1 S. & M. App. Ca.

MACGREGORS  
v.  
BROWN.

12th Feb. 1838.

do so because the rule is absolute, and admits of no exceptions.<sup>1</sup>

These points being clear, it only remains to be inquired what are the grounds for maintaining that the word "heirs," as it is used and qualified in this entail by the adjection of the term "descending of my body," is to be held in contradiction to the general rule, sufficient to reach and include the institute. If the whole expression as it stands be one which necessarily and by force of definition comprehends him, so as to compel a party reading it to read "my son, the institute, and all the other heirs descending of my body," then undoubtedly he is effectually bound, and the estate is protected against his acts and deeds. But if on the other hand it fall short of this, if it do not point to the institute, and mark him out by plain, direct, and necessary implication, if it leave any thing to be supplied by a presumption of what the granter intended, then the entail is so far defective, and the question as regards the institute is brought immediately within the principle of the cases of Duntreath and Wellwood, and the rest which have been so solemnly decided.

Now, it has already been shown that the expression has a distinct and substantive meaning, independently of any application to the institute, there being a numerous series of heirs to whom, in their character of lineal descendants, it most naturally refers. They are heirs descending of the granter, and they are also heirs of his entail. But the institute is not an heir

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<sup>1</sup> Gordon v. Lindsay, 8th July 1776 and 22d May 1798, Mor. 15467, App. 1, Tailzie, No. 2.

under the entail. He is his father's heir, it is true, in a general sense; he is his heir of line, and as such has actually represented him, but he is not an heir at all in the sense of this deed. The term "heirs," as a term of common law, is at least as comprehensive in its meaning as "heirs descending of my body;" since, whether the subject of the succession be heritage or moveables, it is the descendants of the body, who in the absence of any special distinction to the contrary are entitled to succeed as heirs in the first place. If therefore, it be sound construction to say that the institute is here effectually fettered under the description of an "heir descending of my body," the same rule of construction must hold good wherever the expression is simply "heirs," without any mention of those heirs being heirs of entail. But that very point was decided in the case of Gordonston in favour of the institute's freedom, and in circumstances which may be considered as peculiarly strong for holding him bound. He was the eldest son and heir of the granter, just as certainly as the institute in this case is. He, too, like Sir Evan Macgregor, succeeded his father in a title of baronetcy, and the restrictions which gave rise to the question of his right to defeat the entail were directed not only against "the heirs of taillie," but also against "the heirs who shall happen to succeed to the said lands and dignity." If the term "heirs" could in any case have been deemed sufficient to include the institute, it must have received effect in that instance, for the "heirs" spoken of in the last member of the clause were not described as heirs of taillie; there was even room for arguing that they were distinguished from that class, and that the institute, as heir

MACGREGORS  
v.  
BROWN.  
12th Feb. 1838.



MACGREGORS  
v.  
BROWN.

12th Feb. 1838.

to the dignity, was clearly designed and brought within the fetters; but the Court decided otherwise, and the only intelligible reason for the decision, the correctness of which has never been called in question, is, that the term "heirs" must always be construed with reference to the nature and quality of the deed in which it occurs. It is in vain, therefore, to say that "heirs descending of my body" is to be taken as a legal phrase specifically descriptive of the institute, merely because he is in fact a descendant of the entailer, and in common language one of his heirs.

It is almost needless to mention the various forms of expression, by means of which the institute might have been effectually designed without being actually named. Had the clauses of irritancy and forfeiture been directed, after a distinct and separate mention of the institute and of the heirs, against "the person or persons heirs of taillie aforesaid," as was the style in the case of *Syme against Ronaldson Dickson*<sup>1</sup>,—or, as in the *Dougaldston case*<sup>2</sup>, against "each and every heir or person contravening,"—the use of the general and comprehensive term person would have been sufficient to protect the entail against the institute's acts and deeds. In like manner, "all the persons descending of my body," would, by necessary implication, have included the institute as one of the descendants. Had the entailer chosen to designate him more particularly, he might have said, "my eldest son, and all the heirs descending of my body," or he might have introduced

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<sup>1</sup> 27th Feb. 1799, *Morr.* 15473.

<sup>2</sup> *Douglas v. Glassford*, 10th June 1825, 5 *W. & Shaw's App. Cases*, 323; *Baugh v. Baugh*, 14th Jan. 1834, 12 *Sh., D., & B.*, 279.

a clause de verborum interpretatione, declaring that by heirs descending of his body, he positively understood and comprehended the institute. Such a clause would have been obligatory in construction, as giving an explicit definition of the terms which the entailer used. Or it would have been sufficient if he had said, “my heir of line,” or “my heir general,”—because each of these is a well known legal term, denoting a precise and definite character, which can belong only to a single individual at any one time, and that individual would in the present case undoubtedly have been Sir Evan Macgregor, the institute of entail. In short, the purpose might have been effected by employing either direct description or general reference, or words of such a fixed technical meaning as to be incapable of being altered or modified by the nature of the deed wherein they occurred. But none of those modes of expression has been here employed, and though the entailer may have intended to include the institute under the designation of an “heir descending of his body,” he has not effectually done so, because, according to the recognised rules of construction, and without any implication, that term must necessarily be restricted, in an instrument of this kind, to mean “heirs of tailie” properly so called. These may appear at first sight to be very slender and trivial distinctions, but they are, in truth, of the highest importance, and must be so considered as long as any value is attached to strict accuracy in legal expression. It is upon such distinctions that many of the nicest and most difficult questions have arisen in the law of entail, and they cannot be disregarded without unsettling the whole course of the authorities and decisions.

MACGREGORS  
v.  
BROWN.  
12th Feb. 1838.

MACGREGORS  
v.  
BROWN.

12th Feb. 1838.

LORD BROUGHAM.—My Lords, in this case a question arises, which it is not necessary to trouble your Lordships by stating more fully than to observe that it arises entirely upon the construction of a Scotch deed of entail, and on one part particularly of that instrument. It is admitted on all hands, or at least it is nowhere made subject of controversy in the cause, that the prohibitory clause must be valid, as well as the irritant and resolute, in order to render the irritant and resolute clauses valid and effectual. But the question in this case arises upon the sufficiency of the irritant clause. Whether or not that clause be sufficient to fetter the institute or disponee is the only question between the parties. This question was argued with great ability and learning on both sides of the bar; and it remains for your Lordships to decide whether you will affirm or reverse the decision of the Court below, sanctioned by the opinions of twelve of the learned judges, one having been prevented taking a part in the question by being a party interested as a trustee in the cause, and two only dissenting from that opinion,—whether you will establish the decision of the twelve, or establish the principle sanctioned by the two learned judges. Upon a full consideration of this case, I am prepared to advise, and I believe my noble and learned friend concurs in the opinion, that there can be no doubt that a right judgment has been pronounced in the Court below, and that your Lordships ought to affirm that judgment.

My Lords, the words in the irritant clause, upon which the whole question arises, are these: “that in  
“ case the heirs descending of my body, or any other  
“ of the heirs of taillie before mentioned, shall contra-

“vene any one of the particulars above specified,” and so on, “it shall be void,” and that the rights shall be forfeited, and so on. The question, therefore, is, whether the expression, “heirs descending of my body,” includes the institute, the first disponee, or the first taker of the estate under the deed of tailzie. It is perfectly established in the Scotch law, by a train of decisions which have been sanctioned by repeated decisions in the last resort, that under the words “heir of taillie,” the institute, or first taker, shall not be considered to be included; that he is not an heir of taillie; that he takes by purchase, and not by virtue of the grant in taillie; that he stands in a perfectly different position, in respect of the succession, from the stirps,—from that in which the heirs of tailzie stand. The stirps from which all the heirs of tailzie spring and become heirs of taillie is the maker of the entail. The disponee or feoffee takes the fee, subject to the restrictions which are imposed as to devolution or descent; he takes not as an heir of entail from the stirps, but he is as it were a sort of stirps,—he is a sort of new stirps. The rules of conveyancing, and as to service of the heir, clearly show that he is the stirps, and of whom the others spring, and that the heirs of entail are those who spring from him, the institute or feoffee, as their stirps, from whom the heirs of entail proceed.

Now, my Lords, it is perfectly understood, that under the words “heirs of tailzie,” the institute is not comprehended,—that no prohibition levelled at them would prohibit him,—that no irritancy denounced with respect to their acts, the acts of the heirs of tailzie, would be an irritancy with regard to his acts,—that if

MACGREGORS  
v.  
BROWN.  
12th Feb. 1838.

MACGREGORS  
 BROWN.  
 2th Feb. 1838.

they be validly prevented selling the entailed estate, he is not validly prevented, because they are but being understood. A step further has been gone in later decisions, and I allude to the case of Steel v. Steel, commonly called the Baldastard case, which Lord Eldon disposed of according to the strict rules of Scotch conveyancing. It was there held in the Court below, and affirmed by your Lordships, that the institute was not included in the term "the heirs and members of tailzie;" and I beg to state distinctly, that it is not correct to take that view of the decision of the Baldastard case, which was attempted to be taken at the bar, as if "members of tailzie," standing alone, would include "the institute;" and it was only prevented including the institute by the word "heirs" being added. That was not the principle of the decision in the Baldastard case. It is not correct to say,—and that really must be carefully attended to, otherwise it would go down to Scotland as if the Baldastard case had been decided upon the principle—that a man might fetter his institute by the word "heirs of tailzie," if he did not use the word "heirs" in connexion with the words "members of tailzie;" and Lord Eldon is misrepresented in the report, if it is stated that he represented this as the ground that "members of tailzie" have this meaning, unless as that it is modified or controlled by the juxta-position in which those words are found in the deed of entail with "heirs of taillie." I take it to be clear that according to the principle of the case, that supposing "heirs" had not been objected to, members of tailzie would not have included the institute. The word "tailzie" is the material word, for he is not a member of tailzie; he is no more a

member of tailzie than he is an heir of tailzie; he is the first disponee, or first taker by purchase, and is neither an heir of tailzie nor a member of tailzie.

MACGREGOR'S  
v.  
BROWN.

12th Feb. 1838.

That being the established Scotch law upon this point, it remains only to ask the question here first whether (although he be not struck by the words “heirs descending of my body”)—the question is, whether “heirs descending of my body,” if it stood alone, would fetter the institute? and if that question is answered in the affirmative, and against the decision in the Court below, there still would remain the question on the plain construction of these words, whether “heirs descending of my body,” or any others being added to the words “heirs of tailzie,” do not ride over all the antecedents, and consequently convert this into a double use of the phrase, as if the words “of tailzie” had been twice repeated,—“heirs of tailzie descending of my body,” or any of the other heirs of tailzie; for it is never to be lost sight of, that this tailzie contains a limitation, first to the heirs of my body, taking them in the general, and secondly, to other heirs collateral, namely the heirs of his body and the heirs of his second brother, who are named; and even the general clause, in which it is all wound up, and the limitations around it, include heirs whatsoever, none of whom would be heirs of the body of such an entail, but they would be all heirs of tailzie; consequently, the persons to whom all these expressions relate consist of heirs of tailzie descending of my body, and any other heirs of tailzie,—the general heirs of tailzie not of my body. Those, my Lords, are the two questions. I will dispose of the last first.

MACGREGORS  
v.  
BROWN.

12th Feb. 1838.

It appears to me, looking to the natural construction of these words,—and I think it is not only the natural, but even the most literal construction, and if it be the most natural and the most literal construction, then, *cadit questio*, for it is quite clear that he is not an heir of taillie; it is equally clear that he is not an heir of taillie of the body, for he is no more an heir of taillie of the body than he is an heir of taillie generally; the institute can be struck at by neither term. But, my Lords, it is fit that we shall go into the more general argument; for it is upon that, that reliance has been placed, and upon which the question turned, and was decided in the Court below. I shall therefore shortly state my opinion to your Lordships upon that question. It is my opinion that if it had stopped there, it could not strike at or fetter the institute; I am clearly of that opinion. Is the institute an heir? In the first place, all principle and all the cases go against that. Is he an heir of the body? No. Is he an heir descending of the body? In like manner, No; quite clearly he was the disponee; he takes the fee, as all heirs of entail do in Scotland, in a succession of fee simples, only limited by any enjoyment and any fetters which may be interposed and limited as to descend only as the ordinary heirs of the person who takes the first fee. The disponee or institute is not, in legal intendment, the heir, or the heir of the body, or an heir descending of the body. It is not necessary, it is admitted on all hands not to be necessary, that you should, in order to fetter the institute, use any peculiar or technical phrase. You are not bound to say “institute,” you are not bound to say “disponee,” you are not bound to say “first taker,” you are not bound to name him by

his name, but, as I take the liberty to state, it has never been disputed here, or in the Court below, in any one of the cases, that he does not come under the description of heir, or heir of taillie; but he must, in order to be struck at and validly fettered by the entail, be named or referred to plainly in such manner as clearly to show that he, the individual institute, is referred to and struck at in the same manner as if he took by the name of heir of the father, if the designation had been, for instance, sons. There are various expressions that would have struck at him. If it had said in the instrument, "if any of my sons," or "any of my issue," or "any of my children," or even if it had been "one of my descendants," or "a person descending from me," or "any individual of my blood or race," all these phrases would have been words of purchase, and not of limitation, and they would have given an estate to him in his capacity of purchaser, and would have fettered him in respect of the use of that estate. But that is not in the least like "heirs descending of my body," because "heirs" is here the word used in the instrument of entail; and though the words "heirs of my body," if not in an instrument of entail, have a perfectly known sense in law, and according to the canons of descent mean the first son, and after him the second son, and after that second son then the daughters in coparcenery, and so forth. Yet here, dealing with the construction of the words in an instrument of entail, it is to be remarked that they are to be found in that part of the instrument which occurs after the whole of the designation clauses have been gone through, and after the persons have been enumerated, the parties being stated as those who are

MACGREGORS

v.

BROWN.

12th Feb. 1838.



MACGREGORS to take in succession one after another; consequently  
 v. those persons have been all named as heirs, among  
 BROWN. others the heirs of the body of the taker have been  
 12th Feb. 1838. named. And how have they been named? As heirs  
 in the one case, and as heirs of the body in the other.  
 But they have been named as heirs of taillie, and con-  
 sequently, in dealing with the expression “heirs de-  
 scending of my body” in the instrument, reference  
 must be had to the antecedent part in which they have  
 been stated not only to have been heirs of the body,  
 but heirs qui ad hoc,—who were to take the en-  
 tailed estate; consequently, in other words, the heirs of  
 taillie.

My Lords, these appear to me to be perfectly clear principles of construction,—clear inferences from those principles, I rather ought to say, which flow from the decisions in the former cases. It appears to me this case could not stand, if it had been decided otherwise, with the Duntreath case. I do not see how that case could stand with this case. If explained as I have taken leave to explain it, it had been disposed of otherwise than it was in the Court below. The Duntreath case has been represented as laying down the law too closely; but it is perfectly clear that it had laid down no new law; that the Court of Session had abandoned the law, perhaps, under the pressure of the hardship in the case; or under a wish the better to support the entails, they had deviated from the law which had been growing up ever since the act of the year 1685 had become the subject of judicial decision, and the construction of which, in later decisions, had been laid down differently from the construction put upon it in the Duntreath case in the Court below. And it is per-

fectly clear that if the House of Lords, acting under the advice of Lord Mansfield, had come to a different decision from that to which they came, they would have changed the law of entail in Scotland, and would have repealed, I will not say the act, for that could not be done; but, as we are all aware, the law of entail does not depend so much upon the act as upon the decisions upon that act. It is felt, both in Scotland and here, that no man can discover the law from the act, in which the word "institute" is not mentioned. If the Duntreath case is law, it is clear the appellant in the present case is not an heir of entail. That being so, it is clear the decisions of the former cases could not have stood,—I will not say the act, but the decisions upon the act,—if this case had been otherwise decided than it was.

MACGREGORS  
v.  
BROWN.

12th Feb. 1838.

The Duntreath case, as your Lordships are aware, affirmed the doctrine which had been laid down in the case of *Leslie v. Leslie*, commonly called the *Findrassie* case; that case had laid down the self-same rule clearly and explicitly. If the judgment in the Duntreath case had not been reversed, the *Findrassie* case was no longer law; that is perfectly certain. Upon that ground, case after case has been decided in the Court below and here; and the decision in the Duntreath case, though overruling the opinion of the then majority of the Court below, has been held ever since to be law, as *Shelly's* case, and others, have ever since their decision been considered as giving the law of England. If the Duntreath case had been otherwise decided than it was by this House, the *Findrassie* case in Scotland would no more be law than *Shelly's* case would have been law in England if *Perrin v. Blake*, which happened in

MACGREGOR'S later times, had been decided in favour of a tenancy  
 v. BROWN. for life against that which was the decision in that case  
 12th Feb. 1838. for a tenancy in tail. That would really have been  
 exactly the same case; it would have almost broken in  
 upon the rule in Shelly's case, as the Duntreath case  
 would have broken in upon the rule in Scotland if  
 the decision in the Court below in the Duntreath case  
 had not been overruled.

My Lords, I feel myself bound to say more in  
 consequence of Lord Eldon having been represented  
 to have doubted the Duntreath case, and to have  
 thrown a kind of discredit upon it. He did no such  
 thing. I have heard Lord Eldon twenty times over,  
 in this House, express his opinion that the Duntreath  
 case was the canon of the Scotch law; and all he said  
 in the Baldastard case (Steel v. Steel) was, that it  
 surprised him when he first saw it; but he never meant  
 to say that when he came to consider it his surprise  
 was not lessened, or that he would not have been sur-  
 prised if they had decided the other way. On looking  
 at the former cases he never could have felt so. But  
 I am the more anxious to state this, because this is one  
 of those cases in which your Lordships have been  
 advised to differ from the Court below in respect of a  
 law peculiar to that country and their technical law.  
 It happened that three years ago, namely, in the year  
 1835, I was compelled to call upon your Lordships to  
 reverse a decision pronounced by a very great majority of  
 the Court below upon the same question in the case of  
 Morehead v. Morehead, commonly called the Herbert-  
 shire case, in which their Lordships, after sixty years  
 following the Duntreath case, in deference to this House,  
 and to their own knowledge of their own law, had all

'at once departed from it' again; they were going as widely in the Herbertshire case as Lord Mansfield had sixty years before done in the Duntreath case. I felt absolutely bound, therefore, to enter at great length into the merits of that case, and to call upon your Lordships to reverse that decision, which you did; and it has been a source of great satisfaction to me to learn that their Lordships in the Court below have come to the opinion that this decision was right, and that the decision in the Court below was wrong, that we restored the law again to its proper state. Several of the learned judges of that Court have very candidly admitted to me that we were right, and that the Duntreath case, and the other cases to which I have adverted, could not have been allowed to continue law if we had not reversed that decision in the Herbertshire case.

My Lords, it only remains that I should say one word with regard to a case which has been decided, for the other cases are not necessary to be considered. The case of *Syme v. Ronaldson Dickson* is a clear case, in which, not by mere implication, but by the plainest reference which can be conceived, the institute is struck at, and all but named; he is all but called the institute. If you look at the construction of that sentence the decision could not possibly have been otherwise in *Syme v. Dickson*. But the case to which I wish to refer is the *Gordonston* case in 1799, and which was brought here. That is quite as strong a case as the present; it is not correct to say that this case goes one hair's breadth further in advance of former cases, and particularly the *Findrassie* and the *Duntreath* cases, than the *Gordonston* case goes. For what was that? The

MACGREGORS

v.  
BROWN.

12th Feb. 1838.

MACGREGORS <sup>v.</sup>  
BROWN.  
12th Feb. 1838.

question was, whether the institute was to be held to be fettered by the words “persons succeeding to the lands and dignity,” which was a baronetcy. Now, under the words “persons succeeding to the lands,” heirs of taillie, no doubt, would be implied, and consequently it might be said that the institute was not struck at by that. But persons succeeding to a baronetcy could not succeed by force of the entail, consequently that was *designatio personæ*; the words are words of purchase; the person succeeding to the baronetcy indicates that the individual takes not by the words of the entail, with which a baronetcy has nothing to do, but by the words of the letters patent of the crown. Nevertheless the Court below,—and the decision was here affirmed,—held that that did not strike at the institute, but that those words were to be taken as if they were coincident to “heirs of taillie,” which did not fetter the institute.

My Lords, I have stated that the great majority of the judges in the court below came to the decision in question. It remains to be added that two learned judges of great learning and of great weight took part on the opposite side, and came to what I consider a very erroneous opinion. It is admitted on all hands, that Lord Glenlee’s opinion cannot stand for a moment; for his argument upon the institute being included as an “heir of taillie” before mentioned, would unsettle the whole law; and it was admitted at the bar by the learned counsel, particularly the Attorney General, that they could not say a word in support of that opinion. Then my Lord Mackenzie’s opinion rests upon this,—and a great fallacy most undoubtedly it is for so able a man: he says you are applying two different rules of

construction; here you are jumping about from one thing to another. At one part of the entail you apply a rigorous construction, and at another part you are applying a lax construction;—a vigorous construction in favour of the fetters on the one part, and a lax construction in favour of the liberty of the heirs of entail on the other. To be sure you are; but that is not wrong; it is not inconsistent with principle; on the contrary, that is the very principle of the law of entail. Wherever the question is, shall you extend the fetters? you are in favour of the freedom of construction; wherever the question is, shall you extend the freedom—shall you extend the powers—shall you extend the licence given to the parties? in that case you are on the other hand lax. You take exactly one way or another according as you are dealing with the fetters or with the powers; according as you are dealing with the restrictive or with the enabling part of the deed. And instead of that being an anomaly and an inconsistency that principle runs through the whole of the Scotch law in the construction of instruments.

Then, with respect to the case of *Baugh v. Murray*, which is the only one referred to in support of the argument of this appellant, that stands in peculiar circumstances, being a decision of the learned judge, Lord Mackenzie himself. It is a decision somewhat of the nature of a nisi prius decision of a single judge, which was never supported by the Court, but which, when it was brought before the Court, was very much cavilled at. The Court threw every discredit upon it, and said that they affirmed his judgment, but not upon those grounds; and they took a perfectly different view of the case from him on that point on which the case.

MACGREGORS.

v.

BROWN.

12th Feb. 1838.

MACGREGORS had been decided. I therefore look upon Baugh v.  
 v.  
 BROWN. Murray as no case whatever, and as not coming at all  
 12th Feb. 1838. into contact with the weight of authority on the other  
 side, more particularly the Gordonston case, which goes  
 to the full as far as the present.

My Lords, upon the whole, though I was at first disposed to think the decision in this case goes a step further than that in the Duntreath case, I do not on consideration think it goes further at all; but I am quite certain that if it does go further it goes in the same direction, and upon principles short of which you cannot stop in this case; and of this I am clear, that it does not go so much further in advance of that case as the decision in the Gordonston case. Upon the whole, I have no hesitation in advising your Lordships to affirm this decision; and I should not have gone so far into the case, but for the part I took in 1835 in some other cases—the Elibank case, the Herbertshire case, and another case, heard first before the Lord Chief Justice of the Court of King's Bench, and afterwards heard before the Lord Chief Justice, the present Lord Chief Baron, and myself, in which we all concurred in reversing the judgment of the Court below. It is of high importance that the law of real property should not vary from time to time; should not bend according to circumstances; should not be flexible, above all, according to the hardship of any particular case. If it were to be so, I must say a harder case than this I have not often known; but if the law be a bad one it ought to be changed in the regular way by the legislature, certainly not by overruling former decisions.

My Lords, I think as the Court were of different opinions, and this is a hard case—a suit by a creditor

against the heir, and a case very fit to be brought here for argument,—I should humbly propose to your Lordships to say nothing about costs.

MACGREGORS  
v.  
BROWN.

12th Feb. 1838.

LORD CHANCELLOR.—My Lords, I entirely concur in the opinion which has been expressed by my noble and learned friend. I shall very shortly state to your Lordships the grounds upon which I come to that conclusion. My Lords, several points were taken in the Court below, but at your Lordships bar the case was reduced to one single point. It is not disputed that Sir Evan Macgregor is the heir of the entailer, that he is in this deed of entail to be considered as the institute or disponee under the deed of entail. It is clear from the authorities that the institute or disponee is not fettered unless he is included in the irritant clauses in question, though he be included by name in some of the provisions of the prohibitory clauses. It is also clear from the authorities that he is not to be considered as included in the irritant clauses, unless he is either named therein, or unless some designations are to be found in that clause necessarily including him; that expressions which in themselves may or may not include the institute, are not to be held as including him, because it is to be inferred from those of similar expressions in other parts of the deed that they were intended to include him. In the case of *Steel v. Steel*, Lord Eldon, referring to the *Duntreath* case decided in this House, stated this to have been the acknowledged rule and principle, at least from the date of that case. Upon that rule and principle this House acted in that case of *Steel v. Steel*, and in the more recent cases of *Lord Elibank v. Murray*, and *Morehead v. Morehead* in 1835.



MACGREGORS  
 v.  
 BROWN.  
 12th Feb. 1838.

My Lords, after those decisions in this House, and the uniform acting upon this rule and principle by the Court of Session, it is not very material to inquire into particular cases which may have occurred, in which doubts may have arisen as to the meaning of particular words used in cases in which there was never any intention of departing from the rule so laid down. The only question therefore is, whether the circumstances of this case bring it within that rule and principle? Now, my Lords, it appears that Sir Evan Macgregor was the eldest son of the author of the entail, and the designation is to himself in "life-rent," and to Sir Evan Macgregor his only son in fee, whom failing to John Athol Macgregor his grandson, and the heirs male of his body, whom failing to various other classes of persons, all of whom would be heirs of the body of the entailer,—and that description of persons includes all who could be heirs of the body,—whom failing to his brother and divers other classes of persons who would not be heirs of his body. Some of the prohibitions are as follow: "It shall not be lawful for Sir Evan Macgregor or John Athol Macgregor, or any of the other heirs of taillie;" but in the irritant clause the terms used are: "in case the heirs descending of my body or any of the other heirs of taillie before mentioned shall contravene," and so on; and the resolute clause is: "the person or persons so contravening." The question is, whether the institute be included in the words "heirs descending of my body"? for that he cannot be included in the words "heirs of taillie" is quite clear upon the authorities.

Now, there were two classes of heirs of taillie under this entail; first, persons descending of the entailer's body,

and secondly, other persons not descendants of his body, and the obvious and natural construction of the sentence is, heirs of taillie, whether descendants of my body or of any other description; and if such be the construction it is not contended that the institute would be included in it. But the question is not whether the words may not include him, but whether they necessarily do include him. The clause provides for events which might take place when the parties under the deed of entail were in possession; but the son Sir Evan Macgregor never could be in possession as heir quoad this property. The deed itself destroyed the possibility of his being in possession as heir; and the entailer is speaking not of his heirs of line, but of persons to be entitled under the deed, many of whom would be heirs descending of his body under the deed, which the institute never could be. To include the institute in these words would therefore be a forced construction, and a stretching of the meaning of the words beyond their natural import; and as the rule is that the institute cannot be included by implication or by a construction of words capable of a different meaning, adopted from other parts of that deed, but only by an intent clearly and unequivocally expressed within the clause itself, it appears to me quite clear that this case is not within the rule. If the words "heirs before mentioned" had been used alone, there could be no doubt that the institute would not have been included; but the words in this deed would have had precisely the same meaning as the words "heirs descending of my body, or any other heirs of taillie before mentioned," for of such all the heirs taking under the entail consisted.

MACGREGORS  
v.  
BROWN.

12th Feb. 1838.

MACGREGORS

v.

BROWN.

12th Feb. 1838.

My Lords, no case appears to have occurred in which the question turned upon the precise words to be found in this case; but as the rule is clear, there does not appear to me to be any difficulty in applying it to the words to be found here.

My Lords, we are not at liberty to look into other parts of the deed for the purpose of discovering the entailer's intention, and thereby of including the institute in words which do not properly include him, but if we were at liberty so to do we should find that he considered his son as an heir of taillie; but if that be so, the whole ground fails for construing the words "heirs descending of my body" otherwise than "heirs of taillie descending of my body"; and if so, all the cases from the Duntreath case prove that the institute cannot be fettered under such description, although the intention of the entailer to include him may be manifest from the other parts of the deed.

My Lords, I have no hesitation therefore in concurring in the opinion of the great majority of the judges of the Court below, and in moving your Lordships to affirm the interlocutor appealed from.

The House of Lords ordered and adjudged, That the said petition and appeal be and is hereby dismissed this House; and that the said interlocutors therein complained of be and the same are hereby affirmed.

HAY and LAW—RICHARDSON and CONNELL, Solicitors.