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of land are given, not to David, but to Robert Ballantyne.—The fact that the letter addressed by Robert Ballantyne to John Dalgleish, containing the obligation to grant the two pieces of land to David Ballantyne, does not bear date till September 1808, although the settlement bears date in February 1808, being more than seven months after the date of the settlement. To the circumstance that it seems to be totally unexplained for what reason no such letter was written until the month of September, although the settlement was executed in the previous month of February.—And to the circumstance, that it does not seem to appear how far John Dalgleish was or was not informed of what would have been the effect of the settlement of the month of February, in case his death had happened before the month of September. And it is further ordered, that after reviewing the said interlocutor, the said Court do decree and decern as to the Court shall seem meet.

For the Appellant, *W. Erskine, H. Cockburn.*

For the Respondent, *John Leach, Duncan Mathewson.*

NOTE.—Unreported in the Court of Session.

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[Fac. Coll. Vol. xvii. p. 594.]

ROBERT GEORGE STEEL, Merchant, London, *Appellant;*

ROBERT STEEL, eldest son of the deceased Robert Steel, Merchant in London; JOHN MABERLY of Castle Street, Longacre, Westminster, Currier; and ALEXANDER DUNCAN, W.S., ... } *Respondents.*

House of Lords, 18th and 24th June 1817.

ENTAIL—PROHIBITORY CLAUSE AGAINST SALES—"MEMBERS OF TAILZIE."—An entail contained a clause prohibiting "All or "any of the said heirs or members of tailzie, or their succes- "sors, to sell," &c. There was no express mention of the institute as included within this prohibitory clause, although from other clauses in the entail, it was contended that he was included. Held, that under the terms "all the heirs or mem- "bers of tailzie," the institute or disponee was not included, and, therefore, that he had right to sell the estate.

George Steel, the appellant's granduncle, made an entail of his estate, of this date, 6th March 1790, conceived in these

terms: "to and in favour of himself in liferent, for his life-"rent use only, and to George Steel, merchant in London, "his nephew, and Harriet Applin, his spouse, in conjunct "fee and liferent, and the heirs whatsoever of the body of "the said George Steel in fee, whom failing, to his own "nearest heirs and assignees whatsoever."

The deed of entail was recorded during the entailer's life. He died a few months thereafter, on 24th June 1790.

George Steel and Harriet Applin, the conjunct fiars in this entail, made up titles to the estate under the entail. A crown charter, which proceeded on the procuratory of resignation in the deed of entail, was expede in their favour, which contained all the conditions, provisions, and irritances of the entail verbatim engrossed, and infeftment followed thereon, in their names, and was recorded.

In this entail there was this prohibitory clause: "*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*, *dis-*"*pone*, wadset, or impignorate, all or any part of the lands "or estate before mentioned, nor to grant bonds or infeft-"ments of annual rent or annuity furth of the same, or any "other right redeemable or irredeemable," &c. "*all which* "*debts, acts, and deeds are hereby declared void, in so far as* "*they may affect all or any part of the said estate.*" The sixth clause provided an annuity to Anne Applin. The seventh clause set forth, "That the whole *heirs and members* "*of tailzie above-mentioned*, and their heirs and successors, "who shall happen to succeed to the said lands and estate, shall "become bound, as by their acceptation 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 specified, or omit and neglect the fulfilling "and observing the same, such person or persons shall," &c.

George Steel, the nephew, afterwards was advised he could sell the estate, as he was the institute, and the fetters in the entail were not made to apply to the institute in express terms. Accordingly, he and his wife granted a trust-disposition to trustees, for the purpose *inter alia*, of selling the estate.

The estate was, accordingly, sold by public auction, without success, but was afterwards sold by private sale.

Nineteen years after it was sold, the present action of reduc-

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tion of the trust-deed, as well as subsequent sales of the estate was brought, calling the trustees and the several purchasers.

The Lord Ordinary (Balgray) after having disposed of some dilatory defences, pronounced this interlocutor: "The

July 6, 1813.

"Lord Ordinary having considered the memorial for Robert George Steel, pursuer, with the counter memorial for Robert "Steel and others, defenders, and whole particulars: Finds, "1st, That, in 1790, George Steel disponed his lands of "Baldastard to and in favour of himself in liferent, for his "liferent use only; and to George Steel, his nephew, and "Harriet Applin, his spouse, in conjunct fee and liferent," &c., "whereby the said George Steel, junior, became dis-"ponee or institute under the said deed; 2d, Finds that "the procuratory 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 ap-"pointed 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., "3dly, "Finds, that by the fifth clause of the entail, it is declared, "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, dis-"pone, 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. 4thly, Finds, that in the sixth clause "of the entail, where an annuity is granted to Anne Applin, "the foresaid George Steel and Harriet Applin, his spouse, "is contra-distinguished to the other heirs and members of "tailzie. 5thly, Finds, that under these circumstances, the "expressions in the entail, '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 ex-"pressions, 'heirs or members,' or 'heirs and members,' must "be held as synonymous terms; and, therefore, finds, that "the said George Steel had the power to sell the said lands "in the manner which he did in 1791, and that, in conse-"quence of the principles acknowledged in the case of Dun-"treath and Wellwood, and other decisions of the Court, "the prohibitions 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; therefore, "assoilzies the said defenders from the present action, and "decerns; and in respect, that the case has been ably and

" fully discussed in the memorials, and, that it is a question, " proper for the consideration of the whole Court, dispenses " with any representation, but supersedes extract till the " first box day in the ensuing vacation."

On two several reclaiming petitions to the Court their Lordships adhered.* Jan. 14, 1814.

Against these interlocutors the present appeal was brought to the house of Lords by the pursuer (appellant.)

Pleaded for the Appellant.—The disposition which, along with the various subsequent transmissions of the estate, it is the object of the present action to set aside, was an act in direct contravention of the entail under which George Steel, the disponer, held the estate. To constitute a contravention, it is necessary, *first*, that the act should be of the description struck at by the prohibitory, irritant, and resolutive clauses;

Opinions of the Judges:—

* Lord Succoth.—" The interlocutor I think right. The heirs or members of tailzie must be held as synonymous, considering how they are used throughout the deed. The institute might have been included under the words, '*members of tailzie*,' but the question is, Whether that is the case in this instance?

" These words occur in some of the clauses of the entail and *not in others*. They are not to be found in some of the most natural clauses, particularly in the irritant clause, so that no irritancy is imposed upon the institute, supposing the words ' members of tailzie,' to include him.

" This is most natural. The main prohibition against altering the order of succession is also directed against the *heirs*.

" But the sixth clause, which relates to an annuity to Anne Applin, is the strongest; the institutes are distinguished from the *heirs*, by being named, and yet the words, and ' members of tailzie' are applied to the heirs. It is to no purpose, that the expression ' other heirs' of entail occurred, for these occur in the case of Duntreath.

" The cases quoted in the petition are strong, except, perhaps, that of Syme *v.* Ronaldson Dickson. But there the prohibitions against alienating, selling, &c., are directed against the *institute* by *name*, ' John Ronaldson, *my son*.' *Vide ante*, vol. iv. p. 471.

" The irritant clause again says, ' in case my said son,' or any ' of the heirs of entail, shall,' &c., and the resolutive uses the words, ' but also the *person* or *persons* heirs of tailzie foresaid.' Here the words *person* foresaid was held to mean the institute specially mentioned in the irritant clause with which it was connected." The other judges concurred on the grounds stated in the Lord Ordinary's interlocutor.

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and, *secondly*, that the person by whom it was committed, should be subject to the operation of those clauses. Here both requisites concur. The deed which it is the appellant's object to declare an irritancy and to reduce, is a conveyance, by which George Steel "gave, granted, assigned, and dis-poned," the entailed estate to certain trustees, with powers to sell, which powers they actually exercised. By the fifth clause of the entail, it is declared, "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 said estate before mentioned, nor to "grant bonds," &c., "*all which* debts, acts, and deeds, are "hereby declared void, in so far as they may affect all or any "part of the said estate." The resolutive clause was in these terms, "Septimo, *That the whole heirs and members of tailzie* "*above mentioned*, and their heirs and successors, who shall "happen to succeed to the said lands and estate, shall become "bound as by acceptation 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 con-*"*trary hereof, or of any of the conditions, provisions, and obli-*"*gations before specified, or omit and neglect the fulfilling and* "*observing the same*, such persons so contravening shall," &c.

The entail therefore contains prohibitory, irritant, and resolutive clauses applicable to the act of disponing committed by George Steel; and these clauses are directed, not only against HEIRS, but against the HEIRS AND MEMBERS OF TAILZIE—a general description which must reach George Steel. No doubt, the respondents say, that though the acts of disponing were sufficiently struck at by the entail, yet, George Steel being institute, was not subject to their operation, and refer to the Duntreath and other cases. But the slightest consideration of the terms of the restrictive clauses of the entail of Baldastard, is sufficient to show, that the question really in dispute here, is totally different from that which occupied the attention of the Court, in the cases cited by the respondents of Edmonstone of Duntreath, Gordon *v.* Gordonstone, &c. The present case is entirely new, and the decision now under appeal, if not reversed, will extend its operation far beyond any of those which have preceded it.

Pleaded for the Respondents.—The sole ground on which the appellant attempts to distinguish the present case from the

numerous cases which have been decided, both by the Court of Session and your Lordships, settling the law that fetters imposed on the heirs of tailzie *only*, do not affect the institute, fiar, or disponee, is, that in some of the clauses of the entail of the estate of Baldastard, the conditions are not imposed upon the heirs simply, but upon the heirs and *members of tailzie*, and though he cannot contend that George Steel, the institute, was an heir of tailzie, yet he contends he was a member of tailzie. But a *member of tailzie* can only be one upon whom the fetters of the entail are imposed; and to say, that George Steel, the institute, was a member, is just begging the question. When, the appellant argues that the entailer, by making use of that word, discovers his intention to include the institute, though he has not described him technically, or by name, he attempts to overturn the doctrine laid down in all the cases decided for the last seventy years. In the present case, it is submitted to be perfectly clear, that the resolutive clause is directed solely against the heirs of entail; the occasional addition of the words, "or members," or "and "members," is so employed as to show it is merely redundant, having no stronger meaning than the term "heirs of "tailzie," when used by itself. The exception from the prohibition to contract debt, of powers for providing for wives and children, given to the *heirs alone*, makes it quite evident that the prohibition was not meant to apply to the institute, who would otherwise, though the favourite person, have had no power to make any provision for his wife and younger children. If it is not admitted, that the words "*members of tailzie*" are merely synonymous with the words "*heirs of tailzie*," then it must be maintained, that the resolutive clause applies both to the institute and heirs, yet the heirs only have a power of providing their wives and younger children. But this construction is totally inadmissible. These terms must be taken as synonymous, and both of them to be distinguished from the institute; this distinction being made in the entail itself; for, by the sixth condition in the prohibitory clause, when he means to lay a burden or fetter on the *institute*, he does so, in this clause, by laying the condition on the *institute specially by name.*

After hearing counsel,

LORD CHANCELLOR (ELDON) said,

"My Lords,

"As to the particular circumstance here that the purchase was

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made in trust, for one of the trustees to sell, that is not made a ground of proceeding in the case, and I give no opinion upon the case, in that view of it; and then the question depends solely on the entail.

"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 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 2d, 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 fetter the *heir* only, in the prohibitory, irritant, and resolutive 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 entail intended to fetter the institute, he has clearly and unequivocally expressed that intention.

"The interlocutor of the Lord Ordinary was this. (Here his Lordship read the Lord Ordinary's interlocutor.)

"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 words *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 tendency to show that he had in view in this instrument, his heirs and substitutes only. '3d, Finds 'that, by the fifth clause of the entail, it is declared, 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 substitution, or their heirs.' Now, it was very ably contended at the bar, and in a manner which might carry

conviction to my mind, if I had not been obliged to guard it by rules of law, and to give 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. '4th, Finds, that in the 'sixth clause of the entail, where an annuity is granted to Anne 'Applin, the aforesaid George Steel and Harriet Applin, his 'spouse, is contradistinguished to the other heirs and members '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 then prevail. '5th, 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, therefore, 'that in consequence of the principles acknowledged in the cases 'of Duntreath and Wellwood, and other decisions of the Court, 'the prohibition against selling or executing other deeds con-'tained 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 adverting 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."

Journals of the House of Lords.

It was ordered and adjudged that, under the particular circumstances mentioned in the said interlocutor of the 6th July 1813, and adverting to the whole contents of the deed of entail, the effect whereof is in question, the several interlocutors complained of be, and the same are hereby affirmed.

For the Appellant, *John Leach, John Clerk, Geo. Cranstoun.*
For the Respondents, *Sir Saml. Romilly, Fra. Horner.*