contract, for the reasons assigned by my noble and learned friend on the woolsack at the conclusion of his speech. But it appears to me to be perfectly clear, that in this case you cannot discover in the deed of 1715 any other contract than that which the parties have fulfilled. If there had been an independent contract, and a covenant to settle the estate with a proper deed of entail, then there would have been a considerable question, in the first place, whether that bound the successive substitutes; and secondly, whether it could be enforced after this lapse of time. I pronounce no opinion upon the last question, because I have very considerable doubt about it. If there is an actual covenant to settle an estate in a different mode from that in which it has been settled, whether that would be good as against the positive or the negative prescription, is a matter upon which considerable doubt arises. I think it, however, wholly unnecessary to give any opinion upon that part of the case. The ground upon which I proceed is, that there is not to be found within the four corners of the deed of 1715 any covenant whatsoever, except that which the parties have performed. There is no other covenant in it, unless you say that in every deed constituting an entail which is void, there is an implied covenant to make it an entail binding upon substitutes. That proposition cannot for a moment be maintained. I cannot see, after fully considering this case, that there was any other covenant whatsoever, except that which the parties have performed. Therefore, even supposing that the heir of entail could be bound at all, I think it is quite clear that there is nothing which binds him in this case.

Interlocutor affirmed.

Appellants' Agents, Maitland and Graham; T. G. Murray, W.S.—*Respondent's Agents*, Connell and Hope; Menzies and Maconochie, W.S.

MARCH 20, 1857.

WILLIAM KELSO MARTIN, &c., *Appellants*, *v.* ELEANORA KELSO and Others, *Respondents*.

Entail—Construction—Destination—Power to Alter—Heirs Female—Younger Daughter—*By deed of entail, an estate was settled upon A, and the heirs whatsoever of his body. The prohibition against altering the order of succession contained the following exception:—"That it shall be lawful to the said A, and the descendants of his body, so often as their apparent or presumptive heirs are females, so far to alter the destination of succession above written, as to settle the estate upon a younger daughter in preference to an elder daughter, or to pass by such daughter altogether." B, a descendant of A's body, being unmarried, executed an alteration of the succession in favour of his youngest sister, to the exclusion of his eldest. The youngest succeeded B, and entered into possession of the estate, and, while unmarried, she executed a deed altering the succession in favour of an immediate elder sister to the exclusion of her eldest. She then applied for, and obtained disentail of the estate, upon intimations to, and consents by, her immediate elder sister and her children alone, as next heirs of entail. In a reduction of all these deeds, and procedure at the instance of a son of the eldest sister, who would have been entitled to take under the original entail had the destination been left undisturbed:*

HELD (affirming judgment), *That construing the clause of exception in the entail, the deeds and procedure under challenge were valid and effectual.*

HELD FURTHER (affirming judgment), *That the word daughter did not solely mean the daughter of the person exercising the power of alteration, but that that power was applicable to the case where, the heir in possession being childless, the next heirs were females.*[1]

In regard to the judgments of the Court of Session in the original action of reduction, the pursuer appealed, maintaining that they should be reversed, for the following reasons:—"1. Because the disposition by Miss Eleanora Kelso to herself and the heirs of her body, whom failing, to Mrs. Utterson and the heirs of her body, with the instrument of sasine, were inept and reducible; in respect that the destination was at variance with the destination prescribed by the deed of entail, and in contravention of the prohibition against altering the order of succession, and did not come within the scope of the exception to that prohibition: And further, in respect, that in so far as she could be held to have any power of alteration, that power could only be exercised by a *mortis causâ* deed, and not by such a deed as she had granted, and could

[1] See previous report 15 D. 950; 25 Sc. Jur. 543, 552. S. C. 2 Macq. Ap. 556: 29 Sc. Jur. 340.

only take effect (if at all) in the event (to which her deed bore no reference) of the apparent or presumptive heir being at her death a female. *Roxburgh Case*, M., Tailzie, App. 30; *Sheppherd* v. *Grant*, 3 S. and M'L. 255. Bell's Prin., § 1703. 2. Because the destination in Colonel Kelso's deed of settlement, in favour of the heirs whatsoever of the body of Eleanora Kelso, and the destination in the disposition by Miss Eleanora Kelso to herself and 'the heirs of her body, whom failing, to Mrs. Utterson and the heirs of her body,' were at variance with the destination prescribed by the deed of entail, and in contravention of the prohibition against altering the order of succession, and did not come within the scope of the exception to that prohibition; and, because, in particular, Colonel Kelso had no power to destine the estate to the heirs whatsoever of the body of Miss Eleanora Kelso, and she had no right to destine the estate to the heirs whatsoever of the body of her sister, Mrs. Utterson. *Breadalbane's Trustees* v. *Breadalbane*, 2 D. 920. 3. Because Colonel Kelso's settlement, and the decree of declarator following thereon, being void and reducible on the grounds before stated, the instrument of sasine following thereon was also void and reducible; and the disposition by Miss Eleanora Kelso being void and reducible, the instrument of sasine following thereon ought also to be reduced. 4. The decree and whole procedure following upon the petition for authority to disentail the estate of Dankeith were void and reducible—1*st*, Because the appellant's mother, himself, and his immediate younger brother, who were, at the date of presenting the petition, the three nearest heirs entitled to succeed to the estate, were not called as parties to the action; and the consent of none of them was obtained to the disentail, in terms of the Statute 11 and 12 Vict. cap. 36. 2*d*, Because the parties, upon whom the petition was served, and whose consent was obtained, were not the parties indicated by the statute. And, 3*d*, and generally, because the procedure relative to the disentail was incompetent, irregular, and unauthorized by the statute."

In regard to the judgments in the supplementary action, he maintained that they ought to be reversed, for the following reasons:—1. Because, according to the destination in the entail, the appellant, failing his mother, was the heir of entail entitled to succeed to the estate of Dankeith on the death of Colonel William Kelso; because the destination was protected by a prohibition to alter the order of succession, subject to a limited power in favour of the heirs of the body of Captain John Kelso; and because the deeds sought to be reduced were at variance with the destination, were granted in contravention of the said prohibition, and were not within the scope of the power. 2. Because, in particular, the exceptional power of altering the order of succession was limited to the case of the descendants of the body of Captain John Kelso having daughters, who might be preferred one to another, and did not extend to the case of an heir who had no daughters, nor entitle any heir to prefer other relations than daughters, as Colonel Kelso and Miss Eleanora Kelso had done.

The *respondents* in their *printed case* pleaded, that the judgments of the Court of Session (in both actions) should be affirmed, because—1. The late Colonel Kelso and the respondent having been, at the date of the deeds executed by them respectively in 1837 and 1849, descendants of the body of Captain John Kelso, whose presumptive heirs were females, were entitled, according to the sound construction of the entail of 1764, and in the exercise of the power of alteration in it, to settle the estate of Dankeith in terms of the destinations in the deeds executed by them respectively in 1837 and 1849. 2. The petition for authority to disentail having been duly served on the three heirs of entail next in order of succession at its date, was a competent proceeding under the Statute 11 and 12 Vict., cap. 36; and the decree, and whole procedure following thereon, having been taken in strict conformity with the statutory requirements, the same were not open to any well founded objection.

Lord Advocate (Moncreiff), and *Rolt* Q.C., for appellants.—The word "daughter" in the power must be taken in its natural sense, as the daughter of the person exercising the power; and such is the obvious meaning of the term in the present deed.—*Redhouse* v. *Glass*, M. 2306; *Ewing* v. *Miller*, M. 2308; *Ker* v. *Ker*, 13th Nov. 1810, F.C. This power, being a deviation from the natural course of destination pointed out by the entail, ought to be strictly construed. Even admitting that Colonel Kelso was entitled to select his sister Eleanora as the next heir, he had no power to exclude the descendants of Mrs. Martin, the eldest sister.—*Dickson* v. *Dickson*, ante, p. 373: 13 D. 1291: 1 Macq. Ap. 729; 26 Sc. Jur. 529. All that the power authorizes is merely, that Eleanora's name is to be substituted for Mrs. Martin's, but no other heir is to be preferred. The word "settle" does not imply the extensive power over the estate which the respondent claims.—*Breadalbane's Trustees* v. *Breadalbane*, 2 D. 920; *Burrill* v. *Cruchley*, 15 Ves. 552. Moreover, Eleanora Kelso had no right to exercise the power by a deed *inter vivos*, which had a present and immediate effect after delivery and infeftment. All she could do was to execute a *mortis causâ* deed. The rule in construing vague expressions like the words "younger daughter," &c., in this power is, that we must look to the state of the family at the time the succession opens, and not at the time the deed was executed.—*Roxburgh Case*, M., Tailzie, App. 30; *Sheppherd* v. *Grant*, 15 S. 173; 3 Sh. & M'L. 255; Bell's Prin. § 1703.

Attorney-General (Bethell), and *Anderson* Q.C., for the respondents.—Though fetters must be construed strictly, yet when a power is given to break in on the fetters, that power is to be con-

strued liberally.—*Macgregor* v. *Brown*, 3 Sh. & M'L. 120. Hence, of two possible constructions of the word "daughter," the more liberal and wide must be preferred; and we may hold "daughter" to mean "female." As to the cases cited on the other side on this point, see Sandford on Entails, 64, 67. The phrase "to settle," both in England and Scotland, implies that the entire fee simple is to be conferred. See cases referred to in *Banks* v. *Le Despencer*, 11 Sim. 508. There is no restriction in the power as to settling the estate by *mortis causâ* deed only, and a deed *inter vivos* was equally valid. If the settler, after executing the deed, were to marry, and have a son at his death, then the deed would be defeasible on that state of things; for the power would not arise, and the deed purporting to be executed by virtue of it would be void.

Cur. adv. vult.

LORD CHANCELLOR CRANWORTH.—My Lords, in this case there were two appeals against several interlocutors of the Court of Session, pronounced, in the first instance, in an action of reduction at the instance of the appellants, to reduce certain instruments mentioned in the summons; and, secondly, upon a second summons, called, whether correctly or incorrectly, a supplemental summons, as to both of which interlocutors were pronounced by the Court of Session. The result of those interlocutors was to assoilzie the defenders altogether; and against those interlocutors the pursuers below, the appellants here, have appealed to your Lordships' House.

The questions, or rather the question, (for, in truth, the whole is resolved into one question,) arises in consequence of a certain deed of entail, which was executed in the year 1764 by a lady of the name of Mary Kelso, concurring with her sister Jane Kelso, who were, or one of whom was, seised in fee of a certain estate called Dankeith, in the county of Ayr, and by that deed of entail, which was duly registered, and infeftment duly taken upon it, Mrs. Mary Kelso, one of the persons entitled, took to herself the estate, as the first institute in the entail; whom failing, the estate was settled upon Captain John Kelso, described as the only son of Robert Kelso, her first cousin, and the heirs whatsoever of his body—he being, therefore, the first heir substitute; and then failing him or his heirs, it was settled upon a number of persons in succession, as successive substitutes, and the heirs male of their bodies. It is not necessary to advert to the particulars of whom those consisted. Then there was the proviso that is usual or necessary in an entail, where the lands are to be carried to the heirs whatsoever of the body of any of the substitutes, "that the eldest heir female and the descendants of her body, so oft as the succession shall devolve upon females or their descendants," shall succeed, excluding all other heirs portioners.

The settlement contained proper fetters against altering the order of succession, against alienation, and against debts; and there were proper clauses irritant and resolutive, making this a very complete entail. It was duly registered, and therefore, as to the validity of that entail, no question has been or could be raised.

The proceedings do not shew precisely how the succession took effect; it does not appear who were the different heirs, except that, on the death of the lady who settled the estate—Mrs. Mary Kelso, Captain John Kelso, who was the first heir substitute, succeeded to her, she dying without issue. He therefore became the heir of entail in possession, holding to himself and the heirs whatsoever of his body. What does appear is, that some time prior to the year 1837, between 70 and 80 years after the date of the settlement, the estate had come into the possession of Colonel William Kelso, as the heir of entail in possession under the deed of entail. Colonel William Kelso being thus in possession, on the 4th April 1837 executed a deed, whereby he purported to give the estate, after his own death, without heirs of his own body, to his younger sister Miss Eleanora Kelso. Colonel William Kelso was never married; and at that time his four heirs apparent were four sisters, of whom Miss Eleanora Kelso was the youngest—the eldest was a Mrs. Martin, and there were two intermediate sisters.

According to the provisions of the original settlement, upon the death, without issue, of Colonel William Kelso, the estate, as settled, would have devolved upon Mrs. Martin, as being the eldest of the heirs portioners. But in the deed of entail there was a clause declaring the entail to be made with this exception amongst others—"that it shall be lawful to the said Captain John Kelso, (being the first substitute,) and the other descendants of his body, so often as their apparent or presumptive heirs are females, so far to alter the destination of succession above written as to settle the estate upon a younger daughter in preference to an elder daughter, or to pass by such daughters altogether, and settle the estate upon the presumptive heir male descended of the body of the said Captain John Kelso, and for these ends to grant such deed or deeds as shall be competent of the law, in the same manner as an unlimited proprietor might do."

Now, Colonel William Kelso being thus in possession as heir of entail under the settlement of entail, and having, as I have already stated to your Lordships, four sisters, of whom Mrs. Martin was the eldest, who would therefore have succeeded if nothing had been done to alter the

succession, and Miss Eleanora Kelso, the youngest, who would not therefore have succeeded, Colonel William Kelso, in pursuance of the power given to him by that exception, executed a deed, dated 4th April 1837, whereby, reciting the deed of entail, he says—"I have resolved to exercise the said power conferred by the said deed of entail on me, as one of the descendants of the body of the said Captain John Kelso, by calling my said sister and the heirs of her body first to the succession of the said estate of Dankeith, failing heirs of my own body." He accordingly did so; and failing heirs of his own body, called Eleanora to the succession, instead of the eldest sister, Mrs. Martin.

Colonel William Kelso died in the month of April 1844, and upon his death Miss Eleanora Kelso obtained infeftment, claiming to be the heir of entail by virtue of the original entail, coupled with the deed which had been executed by her immediate predecessor, her brother Colonel William Kelso. And in order, I suppose, to make her title more secure, she raised an action of declarator in the Court of Session—Mrs. Martin, however, being out of the country, and therefore not defending that action. That action of declarator was raised, and a decree was made, declaring that she was entitled, in the mode in which she claimed to be entitled. She therefore obtained infeftment, and remained in possession of the estate.

So matters remained until the year 1849; and on the 14th April 1849, Miss Eleanora Kelso, never having married, executed a deed, whereby she took upon herself to exercise the same power which had been exercised by her brother, giving the estate in truth, after her death, to one of her intermediate sisters, Mrs. Utterson, instead of Mrs. Martin. The way in which she did it was not by a *mortis causâ* deed, but by a deed taking effect immediately, which proceeds in this way—"Considering that, by the said deed of entail, power is *inter alia* given to the descendants of the body of Captain John Kelso, the first substitute thereby called to the succession of the said estate of Dankeith, so often as their apparent or presumptive heirs are females, so far to alter the destination of succession therein written as to settle the estate upon a younger daughter in preference to an elder daughter, and for that end to grant such deed or deeds as shall be competent of the law, in the same manner as an unlimited proprietor might do; and seeing that my presumptive heirs of entail in the said estate of Dankeith are my sisters, and that from the favour and affection I bear to my youngest sister, Mrs. Mary Susanna Kelso or Utterson, and other good causes and considerations, I have resolved to exercise the said power conferred by the said deed of entail upon me, as one of the descendants of the body of the said Captain John Kelso, by calling my said sister and the heirs of her body first to the succession of the said estate of Dankeith after myself, and the heirs of my own body." And therefore she determined to "convey, alienate and dispone, to and in favour of myself and the heirs whatsoever of my body, whom failing, to the said Mrs. Mary Susanna Kelso or Utterson, and the heirs whatsoever of her body." And then the estate is to go according to the other entail which would have existed, if she had not executed that deed.

About a year after the execution of that deed, namely, in February 1850, Mrs. Martin, who was the eldest sister of Colonel William Kelso and of Eleanora, died, leaving the pursuer, her eldest son and heir at law, and he would therefore have been the person to succeed, if the entail had remained unaffected, and had existed in the same way as it was at its original creation. Very soon after the death of Mrs. Martin, namely, in March 1850, Miss Eleanora Kelso, together with three of the next entitled in the entail, supposing the entail to have been regulated by the deed which she had executed, proceeded, according to the directions of the Statute 11 and 12 Vict c. 36, § 3, to disentail the estate. As the heir of entail in possession, she, together with the three next entitled, (which is the number required by that section of the act,) proceeded, by a petition to the Court of Session, to get a declaration and proper order, whereby the estate tail should be put an end to. That was done, and it was quite regular, if she was the heir of entail in possession, and those three other persons were the three next in succession, which they would be, if she, being properly the heir in possession, had duly executed the deed which she did execute, so as to make her sister Mrs. Utterson and her posterity those who were to succeed next after her, instead of Mrs. Martin and her posterity.

Those being the instruments which had been executed, and the transactions which had taken place, the original action of reduction in this case was raised on the 27th May 1851 by Mr. Martin, the eldest son of the eldest sister, Mrs. Martin, claiming to be the heir entitled under the original entail, alleging that neither the deed executed by Colonel William Kelso, his uncle, nor that executed by Miss Eleanora Kelso, his aunt, had deprived him of his right; and upon certain grounds which he alleged, he claimed, therefore, to have a decree of reduction of the deed executed by Colonel William Kelso, and of the declarator which was made in the year 1844, immediately following the death of Colonel William Kelso, also of the instrument of sasine that followed thereupon, of the deed of disposition that was made by Miss Eleanora Kelso in the year 1849, and of the proceedings which were taken under Lord Rutherfurd's Act for the purpose of disentailing the estate.

That was the original action. When that action came on, it was regularly proceeded with, and there was an interlocutor by the Lord Ordinary which led the parties to discover, that there

was one point which had not been sufficiently raised, namely, the question, whether or not the power, which was contained in the settlement under the exception to alter the course of succession, where otherwise heirs portioners would have succeeded, extended to the case of collateral heirs portioners, or only to daughters strictly so called. And another action of reduction was instituted for the purpose of raising that question—whether correctly to be called a supplemental action or a new action, I do not think it is necessary at all to inquire.

Upon those two actions the question was fully raised. They were considered separately by the Court of Session, and the Court of Session eventually came to the conclusion, that the defender was altogether to be assoilzied, for that there had been valid proceedings, whereby the course of succession had been validly altered, and that by the proceeding in the Court of Session under Lord Rutherfurd's Act, the entail had been effectually barred.

The first question is as to the construction of this exception in the deed—does that exception extend to collateral heirs portioners, or only to lineal heirs portioners? The language is this—"with this exception, that it shall be lawful to the said Captain John Kelso and the other descendants of his body," (that is to say, it shall be lawful for Colonel William Kelso,) "so often as their apparent or presumptive heirs are females," (which was certainly the case, for the presumptive or apparent heirs were his four sisters,) "so far to alter the destination of succession above written, as to settle the estate upon a younger daughter in preference to an elder daughter, or to pass by such daughters altogether, and settle the estate upon the presumptive heir male." The question is, whether or not that was a power to Colonel William Kelso to settle the estate when his presumptive heirs were four sisters, or whether it was a power confined to the case of his having four apparent or expectant heirs being his own daughters.

The conclusion at which I have arrived is that, at which the Court of Session ultimately arrived, namely, that the meaning was, that this power was to extend to any case in which the apparent or presumptive heirs are females. I come to that conclusion principally because those are the words used, and because the exact case to which those words would apply has happened. The apparent or presumptive heirs of Colonel William Kelso were females, and therefore they came strictly within the case in which the power was to arise. The expression afterwards, "so far to alter the destination of succession above written, as to settle the estate upon a younger daughter in preference to an elder daughter," I think may well be taken to mean, and ought to be taken to mean, that whenever the heirs portioners are females, the power to alter the settlement is to operate by giving preference to one of those heirs female over the others, those heirs female not being incorrectly described by the term 'daughters,' it being obvious that if they are heirs portioners female, they must be daughters of somebody. The expression is not to settle it in favour of *his* daughter or daughters, but in favour of "*a* daughter or daughters." It says that he is to be at liberty so to settle it, whenever the presumptive heirs are females. Therefore, I think the Court of Session were perfectly right in coming to the conclusion which they did arrive at, though not unanimously, that there was a power of altering the destination in the mode pointed out by the original deed in favour of sisters as well as in favour of lineal descendants, being daughters.

That being so, the next question is—what was the power that was conferred by this exception? It was argued that the only power that was conferred was to give a life interest to the daughter or sister, as it might be, who should be preferred. The expression is, "and may settle the estate upon a younger daughter in preference to an elder daughter, or pass by such daughters altogether, and settle the estate upon the presumptive heir male." It is a power so far to alter the destination as to settle the estate upon the younger in preference to the elder. Now it is said, that that only means to settle it for the life of the sister or daughter, and that, subject to the life of the sister or daughter, (as the case might be,) the estate was to go just as it would have gone if no such alteration had been made. I cannot come to that conclusion. Upon that subject all the Judges of the Court of Session were unanimous in their opinion, and I cannot conceive that it could be a reasonable construction, that power should be given to settle the estate upon a daughter, meaning that the daughter, upon whom it was settled, was to take a different interest from the daughter in whose place she came. The obvious meaning was to give to the person who should be heir in possession the power, when one of several heirs portioners (the eldest, if there were only sisters,) would, if he were passive, succeed, of saying, that one of the other heirs portioners should be the party to succeed instead of the heir portioner, to whom the original destination would carry it. I think there is no manner of doubt, that when the expression is, that he is to be at liberty to settle it upon a younger daughter, the meaning is, that he may settle it upon a younger daughter with all the incidents that would have attached to the estate in the hands of the daughter originally entitled, if no alteration of the destination had been made.

The next question, and, perhaps, the most important question, is this—Did the power arise when the heirs were females, at the time when the alteration in the destination was made by the heir of entail in possession; or was it only to arise in case the heirs were females at the time when the succession opened? Now, upon that point there was a difference of opinion amongst the Judges below; and, undoubtedly, a very able opinion was given by one of the Judges in the

Court of Session, and also by the Lord Ordinary, in favour of the construction, that a party, to be entitled to have the benefit of the power exercised by that exception, must be one of several heirs female, the heirs being all females at the time that the succession opened. I cannot come to that conclusion, although, I confess, I have had upon that part of the case some doubt. I think this was a power which could not have been meant to be given to be exercised capriciously. The meaning must have been, that the heir of entail in possession should exercise his best judgment by saying, upon which of the several heirs portioners it was most expedient that the estate should devolve. And that would be entirely defeated, if the act was liable to come to nought by the accident of the person in whose favour he should attempt to make the settlement being defeated by one of the co-heiresses, the elder portioner, dying and leaving a son to succeed, after he had made his settlement altering the destination. There is nothing in the language which points at all, of necessity, to any such construction, and I think I see the greatest possible inconvenience in adopting it. The language is quite plain—"that it shall be lawful to the said Captain John Kelso, and the other descendants of his body, so often as their apparent or presumptive heirs are females, so far to alter the destination of succession above written as to settle the estate upon a younger daughter, in preference to an elder daughter;" "and for these ends to grant such deed or deeds as shall be competent of the law, in the same manner as an unlimited proprietor might do." I think the clear meaning of that was, that when he had only daughters or sisters who were to succeed, he might say, that it shall go to the younger instead of the elder sister, in the same way as the proprietor in fee simple might have done; and that no subsequent alteration of those heirs portioners, that might take place after he had so done, could have any effect.

The question is not at all embarrassed by the consideration pressed in the argument, that this would tend to defeat the entail, because the person executing the deed might himself have a son or daughter who would be the person coming in according to the strict line of entail. That is very true; but in such a case as that, you want no reason at all, because, in that case, there is no power given, for the power only is so far to alter the destination and succession as to settle the estate upon a younger daughter in preference to an elder daughter, and not to alter the succession so as to settle it upon a younger daughter in preference to the heirs male of his own body, or the heirs general of his own body. If he had heirs of his own body, no doubt the whole would fall to the ground, not by reason of any necessity of considering the question, whether the heirs were heirs portioners at the time of the death, or at the time of the settlement, but because the power in that case would not have come into operation at all. I am, therefore, of opinion, that in that respect also the Court below came to a correct conclusion.

Then it was said, that this ought not to have been done, as it was done, by a deed operating immediately, but only by a *mortis causâ* deed. I think there is nothing in that objection. The deed that was executed by Miss Eleanora Kelso, though not a *mortis causâ* deed, was a deed strictly calculated to carry into effect the provisions or the intention of the original settler, for it was a deed whereby she, being heir of entail in possession, by virtue of an instrument that had been executed by her brother, makes this estate still continue to her and the heirs of her body, just as it would, whether it was a *mortis causâ* deed or a deed *inter vivos;* and only, on failure of heirs of her body, gives it over to the second daughter instead of the eldest. The form of the deed appears to me to be perfectly unimportant; the substance was, that it was to continue to her and the heirs of her body, if she had heirs of her body, but if she had not, then there was the power of substituting the younger sister for the elder. It appears to me, therefore, upon all these grounds, that it was correctly done.

The only remaining question which was strongly argued upon at the bar, was a question as to Lord Rutherfurd's Act. I cannot have the least doubt, that the meaning of the act was, that, whenever there was an heir of entail in possession, and that heir of entail had, with the concurrence of the three persons next entitled to succeed—I am speaking of old entails, with regard to new entails it is different, but with respect to old entails,—if there was an heir of entail in possession, and there were three other persons who, *rebus sic stantibus*, would be the persons next entitled to succeed, and they concurred in taking proper proceedings in the case, the entail would be barred, just as it might have been by a recovery in this country, or now by the simpler mode that prevails under a recent act of parliament. That was done; and the circumstance that, afterwards, other persons may come *in esse*, whose rights as heirs of entail would override theirs, is unimportant. The object of the statute evidently was, that the heir of entail in possession, with the concurrence of those who, at the time, are heirs of entail, so to say, in expectancy, may have the power of putting an end to the entail, the inability to do which, as we may well know, had been such a scandal upon the law of Scotland for a very long time, and which this act of parliament was introduced to remedy. And to hold that this remedy would not apply to such a case, because other persons, having new rights, might come *in esse* afterwards, would be entirely to defeat the object of that act.

Upon the whole, therefore, the opinion at which I have arrived is, that the interlocutors of the

Court below were entirely correct; and, therefore, the course I shall take is, to move your Lordships that the appeal be dismissed.

LORD WENSLEYDALE.—My Lords, I entirely concur in the opinion which has just been given by my noble and learned friend. The first appeal in these cases is from the judgment of the Court of Session on the supplemental summons of reduction of the deed of settlement made on 4th April 1837 by Colonel William Kelso. And the question is, whether that settlement was authorized by the deed of entail granted by Mrs. Mary M'Gill or Kelso on 27th April 1764.—(His Lordship then quoted the material parts of the deed, and continued.)—Two questions arise upon that deed in the supplemental summons. The first and most important is, whether the power to alter applies to a case, where the apparent or presumptive heirs females are other than daughters of the heir of entail in possession? The second is, whether the clause empowers a substitution of the younger sister, and the heirs of her body, for the elder, and the heirs of her body, or is confined to the substitution of the younger sister only for the elder.

The first question depends upon the construction of the clause in question. There was much argument, whether it was to be construed strictly, as clauses are to be construed, which impose fetters, or liberally, as clauses relaxing the fetters, and restoring the dominion to a certain extent over the estate.

I must own that I think, that, in any mode of construing the clause, the words are sufficiently clear. The power arises whenever the heirs presumptive or apparent happen to be females. If the intention had been to confine the power of selecting to the case of a father with several daughters, the deed would have so expressed it. But the terms are very explicit, that whenever the presumptive heirs are females, be they sisters, nieces, or daughters, the power is to be given. The word "a daughter," which follows, is not enough to restrict the use of the word "heirs female," and confine it to the case of daughters. If it had been "his daughter," it might have been urged, that the use of these terms restricted and limited the prior expression "heirs female," and confined it to "heirs female being daughters." But the general term "a daughter," which is applicable to all daughters, does not qualify the previous description at all.

The second question upon the construction of this clause may, I think, be easily answered. The power to settle the estate, and to substitute the younger for the elder, clearly authorizes placing the younger in the like position as the elder, so that the right of succession might go to the heirs of her body, as it would have gone to those of the elder, if she had taken it in the prescribed order of succession.

I am therefore of opinion that Colonel William Kelso was authorized by the clause in the deed of entail to prefer one of his sisters, and the heirs of her body, to the others.

Then the question arises—was the deed which was *inter vivos* and not *mortis causâ*, an improper form of exercising this power? I think it was not. There is nothing in the power so to limit it. At the time when next presumptive heirs are females, and it is therefore probable that the succession would devolve on the eldest, then the power of selection is to be executed without waiting for the last moment of the life of the donee of the power, and it may be executed by him by any competent deed, in the same manner as an unlimited proprietor might execute it. It may clearly be done, therefore, by a deed *inter vivos*. But it is true that the deed will not take its effect upon the succession until the succession opens; and if then it turns out, that there is an heir prior in the order of entail to those who were apparent female heirs at the time of the execution of the power, it is wholly inoperative. That heir is not displaced; for, as to every other heir of tailzie than the females, the prohibitions to alter the course of succession have their full effect. Therefore, if Colonel William Kelso had issue, who would be prior in the course of succession to his sisters, the deed would be inoperative altogether. His power authorizes him to regulate prospectively the succession among heirs female when it devolves upon them, or to substitute a presumptive heir male of the body of Captain Kelso for them; but he has not a power finally to dispose of the estate, and to supersede those who are prior in the order of entail. Whether Colonel William Kelso had disposed of the estate, as he has done, failing heirs of his own body or not, would make no difference. He has no power to extinguish their rights.

I am of opinion, therefore, that the deed of 4th April 1837 was a legal and valid deed, and cannot be reduced.

The second question, which is the subject of the second appeal, is—what is the effect of the disposition by Miss Eleanora Kelso of 14th April 1849? Is that deed subject to reduction upon any of the grounds alleged? There are three objections urged against it. *First*, that Miss Eleanora Kelso being entitled only by the exercise of the power of Colonel William Kelso, and not by the original entail, as a descendant of the body of Captain John Kelso, could not herself exercise the reserved power when her presumptive heirs were females. This objection cannot prevail. It is clear that she was a descendant of the body of Captain John Kelso, and entitled, by virtue of the tailzie, to the estate, according to its provisions including the provision to alter the succession. This objection, indeed, was not much pressed at your Lordships' bar.

The *second* objection was, that this deed being *inter vivos*, and not *mortis causâ*, was void. That objection has already been answered.

The *third* objection was, that in substance there was an implied condition, that the succession should be in the same or in a similar state when it opened, as it was when the deed was executed. At that time it was necessary, that there should be two or more presumptive heirs female, in order to the due execution of the power, and it was contended, that there ought equally to be two or more when the succession opened, in order to give it effect. At the death of Miss Eleanora Kelso there were not three sisters surviving. The elder was dead, leaving a son, and he was heir in tail, and would be entitled at that time, as there were no heirs female, and the power, therefore, could not have been executed. I certainly have felt the same doubt upon this point which embarrassed some of the Judges of the Court of Session, and am not entirely free from it at this moment. But I think we ought to construe the words of the power according to their ordinary and grammatical sense, in obedience to the rule now, I believe, universally adopted in Westminster Hall, and to give them their full effect, unless that construction would lead to some absurdity or inconsistency with the meaning of the instrument to be collected from every part of it, and such evidence of surrounding facts as is admissible for the purpose of putting the Court in the situation of the framer of the instrument. Adopting this course, I say, that a condition which is clearly not expressed, ought not to be implied, viz., the condition that more than one female heir should exist not only at the time of the execution of the deed, but also at the time of the death of the person executing the power. According to the sound rule of construction, I think I have no right to impose such a condition. The clause in the original deed of entail is perfectly reasonable without it. It gives a present right to make a change which shall regulate future succession, (adopting the language of the Lord Justice Clerk,) and is itself a present act, final, and not dependent on the state of things at the time of the death of the grantee, save always that there is no power in the grantee to displace any heirs entitled in priority to the heirs female, for that would be to alter the succession of the other heirs of tailzie, which is expressly forbidden.

I therefore concur in advising your Lordships to affirm the judgment of the Court below; and I entirely agree with my noble and learned friend as to the effect of Lord Rutherfurd's Act.

Mr. Rolt.—As regards the costs, upon one or other of the points we raised, we had four of the five Judges in the Court below with us; and if the form had been strictly pursued, we ought, in reality, to have been respondents rather than appellants. In fact, we have assisted the respondents in getting a good title, for it can hardly be said that upon such a decision as that the title would have been a very satisfactory title without the decision of this House. I submit, therefore, that we should be free from costs.

Attorney-General.—We did not want these proceedings in order to get a good title. And as for the judgment, all the learned Judges were against the appellants, though for different reasons. You do not scan the reasons which are given for a judgment. Your Lordships will not in this manner deal with the costs of an appeal, when the decree of the Court below is affirmed.

LORD CHANCELLOR.—I think the losing party must pay the costs.

LORD WENSLEYDALE.—It must be so, I think.

Interlocutors affirmed with costs.

Appellants' Agents, Grahame, Weems, and Grahame; John Martin, W.S.—*Respondents' Agents*, Richardson, Loch, and Maclaurin; Hunter, Blair, and Cowan, W.S.

JUNE 5, 1857.

THE CALEDONIAN RAILWAY COMPANY, *Appellants*, *v.* LORD BELHAVEN and Others, Trustees of the deceased John Wilson of Dundyvan, *Respondents.*

Railway—Disposition—Reserving Mines under railway—Statute—Construction—*B., the owner of lands required by the W. Railway Company, conveyed them to the company, reserving the mines to himself, but stipulating that the company should have right to prevent him working the mines under the railway, till proper security be given for any damage that might be occasioned. The W. Co. was incorporated with the C. Co.*

HELD (reversing judgment), *That the C. Co. were entitled to prevent B. working the mines under the line, so as to endanger the surface.*[1]

---

[1] S. C. 3 Macq. Ap. 56 : 29 Sc. Jur. 380.