But when you come to the subsequent act of 16 and 17 Vict., cap. 94, you find the provision is a totally different one. It is that no interlocutor, judgment or decree shall be invalidated—the one operating upon the title or upon the actual conveyances creating the title and rendering them invalid, and the other operating upon judicial proceedings in regard to the estate, so that no two things can be more distinct or different. Then this act, in the clearest terms that language can express, declares—"That no interlocutor, judgment or decree following, or that has followed on any petition presented under the said recited act, shall be questionable," upon such and such grounds. The words are, therefore, in the past tense as well as in the future. They provide expressly for what is past as well as for what is to come. It has been argued that it might have been much more clearly expressed. I do not admit that it could have been more clearly expressed. I think that any other words would have been superfluous. It is expressed clearly, and in accordance with grammatical language. Neither this House nor any other Court of Justice is at liberty to reject clear words, to which a plain construction can be given. You must give to words their ordinary import. And what possible meaning can be ascribed to those words, if you do not attach to them their clear and obvious meaning? It is not contended that any other meaning can be given to them. But it is said—you must strike them out of the act. But why are you to strike them out? Is there any more reason in all time to come for saying that what were matters of form should be considered as having been rightly performed after decree, order, and so on, founded upon those proceedings, than there was for providing against matters of form which had been neglected in times already past? Why should parliament have attempted to make all matters that were prospective right, and yet not have made those matters right which had retrospectively occurred? There is much more reason for giving validity to what is past, and only to be remedied by an act of parliament, than for giving relief for that which is to come, which parties, where they are aware of it, could by proper care and caution guard against. Care and caution could operate prospectively, but not retrospectively. But the legislature has said wisely and properly in both cases, that, after a decree made, authorizing the sale of the estate, all matters which were required by the former act to give the Court jurisdiction, shall be considered to have been rightly performed. Then parliament takes great care to say, first of all, that it is not to apply to cases where an injury has been inflicted; next, that there shall be proper consents. That is the substantial thing, that all the proper consents shall be given. No one contends here that any injury has been done. It would be necessary to prove that injury has been done. There is no allegation of the sort. There is no pretence for it, and the proper consents have been given.

Therefore I entirely agree with my noble and learned friends. I am clearly of opinion that there cannot be a shadow of doubt as to the construction of the act of parliament, and that this is as good a title as I have ever seen; because the title depends on the act of parliament, which will give it perfect validity. I have therefore great pleasure in congratulating the purchaser upon what Lord Eldon said gave a more secure title than anything else—having to pay the costs of the appeal.

Interlocutors affirmed with costs.

Grahame, Weems and Grahame, *Appellant's Solicitors.*—Richardson, Loch and Maclaurin, *Respondent's Solicitors.*

JUNE 13, 1854.

A. W. DICKSON and OTHERS, *Appellants*, *v.* JAMES DICKSON, *Respondent.*

Entail—Provisions to Younger Children—Clause—Construction—*A deed of entail, containing a destination to the institute and the heirs male of his body, whom failing, to another party and the heirs male of his body, whom failing, to A. D., without any mention of heirs, whom failing, to various other persons, empowered the heirs of entail, on their succeeding to the estate, to grant bonds of provision "to their younger children other than the heir in the said lands and estate." A. D. having succeeded, granted a bond of provision, bearing to be in terms of the entail, in favour of his only son and daughter, to the amount of three years' free rent.*

Held (affirming judgment), (1.) *That the son, not succeeding in any event, could not be considered as a younger child other than the heir.* (2.) *That the daughter was in a similar position, and that the provisions were invalid, as under the entail.* (3.) *That they could not competently be claimed, as under the Stat.* 5 *Geo.* IV., *c.* 87.[1]

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[1] See previous reports 13 D. 1291; 23 Sc. Jur. 606; 24 Sc. Jur. 211. S. C. 1 Macq. Ap. 729; 26 Sc. Jur. 529.

The interlocutors of the Court of Session were brought under review of the House of Lords, and it was maintained that they ought to be reversed for the following reasons:—"1. Because the children of Major Archibald Dickson, in whose favour the bond of provision was executed, were not entitled to succeed to the entailed estates, and are, according to the sound legal construction of Mr. Walter Dickson's deeds of entail, to be considered as younger children, 'other than the heir in the said lands and estate.'—Sandford on Entails, p. 376; *Earl of Wemyss*, 23rd Nov. 1810, F. C. 2. Because Major Dickson's daughter being a younger child, 'other than the heir in the said lands and estate,' the bond of provision must be held to have been rightly granted, and valid *quoad* her, even although it were to be held as invalid as regards her brother. 3. Because, at any rate, and even if the power in the deeds of entail, in favour of younger children, were inapplicable to Major Dickson's children, the provision made by their father in their favour is effectual, in virtue of the 5th Geo. IV., c. 87."

The *respondent* in his *printed case* supported the judgments on the following grounds:—"1. Because the clause in the deed of entail, and the relative supplementary entails, empowering the heirs in possession to grant provisions to younger children other than the heir in the lands, does not embrace an heir in possession whose children are excluded from the succession. 2. Because the bond of provision must be read consistently with the terms of the clause of the deed of entail; and, as the appellant and his deceased sister were not within the clause, action cannot be maintained on the bond against the heirs of entail.—Sugden on Powers, 7th edit., vol. ii. p. 270; *Lady Strathallan* v. *Duke of Northumberland*, 2 D. 840; *Erskine*, petitioner, 12 D. 649; *Boyd* v. *Boyd*, Mor. 12,854; *Oliphant* v. *Lord Advocate*, Mor. 2275; *Scott* v. *Scott*, 7 Bell's Ap. 143. 3. Because there are no grounds in law on which the claim of the appellants, the trustees of the deceased Harriet Dickson, can be supported, separate from those maintained by her brother Captain Dickson. 4. Because the act of the 5th Geo. IV., c. 87, commonly called the Aberdeen Act, is inapplicable to the case."

Sir F. Kelly Q.C., and *Rolt* Q.C., for appellants. The first question is one of construction, and we must look to the main intention and object of the entailer in granting the faculty. These faculties are liberally construed, and to support them all manner of violence has been done to particular words and expressions, such as reading younger for elder.—2 Sugden on Powers, 269-70; *Lord Teynham* v. *Webb*, 2 Ves. Senr., 210; Sandford on Entails, 376; *Earl of Wemyss*, 23rd Nov. 1810, F.C. Applying these principles, Major Archibald Dickson must be taken to have held this faculty, and properly exercised it. The object of the entailer being to let in all but the heir in the lands, it would require express words of exclusion to deprive the appellants. It is plain it could not be necessary, that the substitute holding the faculty should have procreated an heir who could succeed, for if his family consisted wholly of daughters, he might validly grant a bond of provision to them. And this shews that even if the son of Major Archibald Dickson be excluded, still his daughter would not be so. But if the bond is not valid under the deed of entail, it is at least valid under Lord Aberdeen's Act, 5 Geo. IV., c. 87, to the extent to which that act allows a bond to be given. The substitute is clothed by that act with an implied faculty. It is not necessary, in order validly to execute a power, that the power should be narrated. A wrong narrative would be immaterial, and so would ignorance of the existence of the Aberdeen Statute in the party exercising the power under that act.

Sol.-Gen. Bethell, and *Anderson* Q.C., for respondent. The only true and consistent construction is, that Major Archibald Dickson was not the holder of the faculty. The case of the *Earl of Wemyss* merely settled this, that children may be read to include grandchildren where there are no children; but if there are children, it does not follow from that case that the decision would be the same. But that case is of no great authority.—*Lady Strathallan* v. *Duke of Northumberland*, 2 D. 840, and 5 Bell's Ap. Ca. 396. It is said these powers must be construed liberally, but we say they must be construed strictly.—*Marquis of Breadalbane*, 2 D. 915; *Ewing* v. *Miller*, Mor. 2308; *Oliphant* v. *Lord Advocate*, Mor. 2275. Or rather the true rule is, that we must ascertain the meaning of the entailer in each case. As to the bond being good under the Aberdeen Act, it is plain that Major Dickson did not wish to avail himself of that act, for he says in express words, that the bond is to be good only in so far as the deed of entail warranted.

LORD CHANCELLOR CRANWORTH.—My Lords, I have no hesitation whatever in moving your Lordships, in this case, to affirm the decree of the Court below. It has been said that it is a question of intention. If the word "intention" is to be taken to mean anything different from saying that it is a question of construction, then I should say that it is not a question of intention. The question is—What is the true construction of the deed? and only so far as you can deduce intention from construction, it is a question of intention.—(Reads the destination clause.)

My Lords, I confess that, when I first looked at this case, I supposed on reading it over that the omission of the heirs male of the body of Captain Dickson was an error of the clerk, and that it had been left out by mistake. But it is perfectly obvious that it is not so. They could not have made that mistake twice; for, first, the settler does not give the estate to the heirs male of his body in the line of succession, when he gives it to the heirs male of all the others; and then, when failing the heirs male of the body of all the substitutes, he gives it to the heirs female

in succession, he leaves him out altogether—clearly shewing that he did not mean his children to take. Therefore, it is exactly the same thing as if he had said—I give the estate to him, but not to the heirs male or female of his body.

Now, that being so, we come to the question—What are we to understand by the power or faculty which is given in favour of the younger children?—(Reads the faculty.) Now, what Major Archibald Dickson or those claiming under him say is this—Archibald Dickson had two children, a son and a daughter, and he therefore had a power under this provision, having succeeded to the estate, of granting a bond to these two younger children. The question is—Whether he had such a power? It appears to me perfectly clear that he had no such power. The language is not that each person who succeeds is to have power to grant bonds to the younger children, but to grant bonds to the younger children "other than the heir in the said lands and estate." What does it mean by saying that they are to be younger children other than the heir? The expression is very inartificial, because the heir would not be a younger child, but it clearly means children younger than the child which shall be the heir.

Then, we have to interpret what is the meaning of the word "younger." According to a number of cases that have settled the law in this country, (and there can be no doubt that the same principle must prevail in Scotland,) the word "younger" in a settlement of this sort means posterior in point of limitation ;[1] not younger in point of age, but only coming to the estate after the others had succeeded. Probably that is as true a definition of the word as can be suggested, namely, coming to the estate after the person who is to be the heir. Then, if nobody is to be the heir, how is this word to be interpreted? It is quite clear that (according to what was stated by one of the learned Judges in giving his opinion in the Court of Session) you would let in all mankind unless you confine the expression to a class, some one or more of whom may be the heir. It cannot apply to a case where none of the family can by possibility be the heir. It appears to me, therefore, that that disposes of the question upon that very plain ground, which is, in truth, the ground upon which the Court of Session proceeded.

But then there was an ingenious point raised, which, I confess, at first struck me as having some weight. It is, that although this appointment with regard to the bond of provision is not good, as taking effect under the provisions of the deed of entail, yet it may be good by virtue of the statute, which authorizes every heir of entail, if he is so minded, to make provision for his younger children by means of a bond—not, it is true, to the same extent as is here provided for, but to an extent short of that. Now, I quite agree with the observation, that the circumstance, that here the provision was extended to three years' rent, whereas under the statute it was confined to two years, would not have made it bad. If the deed had been so framed that it might take effect under the statute, the circumstance that the party attempted to give more than the statute authorized, would not have excluded its operation, to the extent to which the statute did authorize it. But here, in the first place, it is perfectly obvious from the language of the deed, not only that the party executing this instrument did not suppose himself to be executing anything under the statute, but he expressly says he does not. He confines what he does to that which he is authorized to do under the deed, and under the deed only. Perhaps, however, that might not, if the language were scanned closely, be absolutely conclusive against getting aid from the statute. But that is not a distinction of form; it is a distinction of substance. For when we look to what is the course of operation under the deed, and to what is the course of operation under the statute, we find them to be perfectly different. The doctrine that, where a party having a power, does something which is good under that power, (although he did not know it, and thought that he was executing it in some other way,) it will take effect under that power where it is necessary—that doctrine, I say, cannot apply to a case where the party not only never intended to execute the power, but never intended to do the thing which the power under the statute authorized to be done. Under the statute the power was to charge the estate to a particular amount, smaller than this party has attempted (but that is a circumstance that could not be at all conclusive upon the point)—the charge to be repaid in a particular mode, namely, by the payment of one third of the rents, to continue so long as that one third of the rents should be necessary for repaying principal and interest. That is not what was done under this deed at all. There was no attempt made to cause the repayment in that mode of operation. Therefore it was quite clear, not only that there was no intention of executing any instrument, by virtue of Lord Aberdeen's Act, but that that which was intended to be done was something that could not be done under Lord Aberdeen's Act. If Lord Aberdeen's Act had been brought into operation, it would have affected it in a totally different manner. Therefore I think that that argument wholly fails.

That being so, I am relieved from the necessity of considering the question (and a very important one it would be)—Whether, if this had purported to have been done under Lord Aberdeen's Act, there would not have been just the same objection to his executing the power under the statute that there is under the deed? Upon that question I give no opinion, except

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[1] NOTE.—The word "limitation" in England corresponds to the Scotch word "destination" in this branch of the law.

that I wish it to be understood that I by no means assent to the proposition, that if Major Archibald Dickson had thrown the deed overboard, and had said—I do not wish to have anything to do with the deed, I shall only do what I can under the statute,—I say, I wish to be understood as not assenting to the proposition that he had any more power to give this to his children under Lord Aberdeen's Act than he would have had under the deed.

LORD BROUGHAM.—My Lords, I entirely agree with my noble and learned friend, and I must say that I view the case, in both branches of it, in just the same light as he has done. It is perfectly clear that the entailer here was cognizant, not only of the existence of his relative, whom he calls captain—now called Major Dickson—but also of the fact of Major Dickson having two children, a son and a daughter, for whom he makes provision in the other deed of the same date with the deed in question. Then he, not by mistake or by omission, but knowingly and willingly, excludes the children, the heirs of the body of Captain Dickson, as he calls him, from the succession to this entailed estate ; and he gives it to the other heirs, whom he calls to the destination in their order. He gives it first to the institute, and then to the heirs substitutes and the heirs of their body—first to the heirs male, and if the heirs male fail, then to the heirs female. But in the case of Captain Dickson, he gives it to him alone, without any limitation whatsoever to the heirs of his body, male or female. And, as my noble and learned friend has justly observed, what makes it perfectly clear that he intended to leave out the son and daughter of Captain Dickson, whose existence he was aware of, is, that after having exhausted the limitation and destination to the heirs male of those who come after the captain, he reverts to the limitation to the heirs female, and he gives it first to the heirs female of the institute, and then to the heirs female of the substitutes ; but passing over the heirs female of the captain, and going from Andrew, the one immediately preceding him, to Walter, the one immediately succeeding, he gives the estate first to the heirs female of the body of the one and then to the heirs female of the body of the other.

Now, I can very easily understand the meaning of this arrangement with respect to the faculty given to make provision for younger children. I agree with my noble and learned friend in the view which he takes of the meaning of the words, upon which I think that no reasonable doubt can be entertained. I can easily understand the intention of the party executing the entail, and the grounds of that intention. He might intend to say—Whoever shall succeed to this estate, the younger children shall at the same time have a provision made for them. It is a very ordinary arrangement both in England and in Scotland—(it is more general, I believe, even in Scotch than it is in English settlements)—to give the estate to the eldest son, and to make a provision for his brothers and sisters, as the younger children of the party. Armed with that faculty or power, he is, in fact, what is called in Scotland the holder of the faculty to make such a provision. But in this case it appears that no intention existed of giving the estate to any of the children of the captain. Nor did any intention exist of giving the captain the power of making a provision for his younger children.

My Lords, I agree with my noble and learned friend, that there is some obscurity and inaccuracy in the language used. For certainly nothing can be less accurate than to say, "the younger children other than the heir," because the heir cannot be taken to be a younger child *ex vi termini*. That is clear. But that is not the only inaccuracy. There is another of the same sort. In the first place, where the institute is mentioned, you will find the words, "in the power of the said Archibald Dickson, and the other heirs and substitutes." That would imply that the party making the deed considered Archibald Dickson as one of the heirs and substitutes, which it is perfectly clear that he is not. He is not a substitute ; he is the institute. He is not the heir ; he is the disponee. There is the same inaccuracy also in the use of the words, "other than the heir in the said lands," as considering the heir to belong to the class of the younger children. I take the words, "to the younger children other than the heir in the said lands," to mean such of the heirs of entail successively coming into possession of the entailed estates as shall not succeed to the entailed estates. Now, none of the children of the captain could succeed to the entailed estate, and none of his children, therefore, could come within the description referred to in this power.

My Lords, it is needless to refer to cases upon a question of this sort. Nothing can be less fruitful than such references, inasmuch as, unless you find a case that is on all fours with the one you have on hand, you really get very little benefit from these references. If it were desirable to refer to any case, either the case of *Boyd* v. *Boyd*, reported in Lord Stair and also in Morison, or the case of *Oliphant* v. *the Lord Advocate*, would furnish an analogy to the case which is now before us.

My Lords, with respect to the Aberdeen Act, I agree with what the Lord Justice Clerk well observed, that it is not necessary to set forth in an instrument executing a power that it was framed in execution of that power. Nay, I am of opinion that even a power afterwards accruing to the party making the instrument might validate that which at the time of its execution was invalid. But no case has been produced, and it is quite clear that, as the Lord Justice Clerk does not make any reference to any, none was in his contemplation, in which, there being a question as to

two faculties under which an act might have been executed, and one of them being expressly stated by the party executing the deed to be the one under which he executed it, and the other being excluded by the deed, and the first mentioned faculty not being valid — I say no case has been produced in which, under these circumstances, the other power has been held to validate the instrument. Now, in this case, it is as clear from the nature of the instrument that reference to the Aberdeen Act is excluded, as if he had said in so many words—I grant this, not under the powers of the Aberdeen Act, but under the faculty reserved to me by the deed of entail. As to the difference between three years and two years, I agree with my noble and learned friend, that that would not be at all material, except that it is an additional reason for holding that he had not in his contemplation the powers given under the Aberdeen Act. But the other ground stated by my noble and learned friend is quite sufficient. He is doing an entirely different thing from that which the Aberdeen Act entitles him to do.

Upon the whole, therefore, I have no doubt whatever that the Court below has rightly decided this case; and I agree with my noble and learned friend that the interlocutor appealed from ought to be affirmed, and the appeal dismissed with costs.

LORD ST. LEONARDS.—My Lords, I cannot say that I have entertained any doubt upon this case from the first moment that I understood it. It appears to me not only to be simply a question of construction, independently of the meaning of the Aberdeen Act, but upon the construction of this settlement there surely ought not to be, and, I apprehend, that there is not, any doubt. It is very unusual in an entail to find, as in this case, a mere liferenter introduced. But, as has been already observed, there can be no question here of that happening *per incuriam;* because not only is his name altogether omitted in the subsequent limitations, where the heirs female of the other persons, for whose heirs male provision had been before made, are mentioned, but when he comes, by the testamentary disposition of the same date, to make provision for the very same person, Captain Archibald Dickson, for whom alone (without providing for his heirs) he had provided by the first deed, he makes a provision there of a sum of money for him and the heirs of his body. Therefore he draws an exact distinction between the provision given to him alone by the one instrument, and the provision given to him and his heirs by the other instrument. It is very true that by that instrument provision also was made for Walter, who takes in remainder, and to whose heirs there is a limitation in the first deed; and therefore it will not do to rely too much on that. But in the instrument of the same date there is this important circumstance—he provides for the son of Archibald as an only son, and, in case he should die, he gives a provision intended for the son to his only sister. He knew, therefore, that there were two children, and for those two children alone he intended to provide. I think, therefore, it is not necessary to go into any argument to shew that the settlement is precisely what he intended as regards the limitations.

Then, my Lords, the question is—Whether, upon the words here used, he intended to include Archibald in the power which he has introduced, or the "faculty," if you like to call it so—but I shall take the liberty of calling it the "power," for, sitting in a court of equity to administer Scottish law, I am not forced to do that which I am incapable of doing—to speak the Scottish language. Now, if I am to look at this power, does it or does it not include Archibald? It has been said—if the name had been there, then, of course, he would have had the power. Nobody has attempted to deny that the settler had the power, if he had chosen to exercise it, of giving to Archibald the particular faculty or power in question. Therefore, if he had said in so many words that Archibald should have this power, of course he would have had it. But that is not the case here. Therefore, when you find the general terms, "the other heirs and substitutes" (however inaccurate they may be) in the introduction, and when you afterwards find a description of the persons who are to take the power, which is incompatible and inconsistent with Archibald having the power, then the question is, upon the whole instrument taken together, does it or does it not include Archibald? I am not certain that the person who drew this instrument was not misled in this way. After having provided for all the different persons in succession for whom he intended to provide, and for the heirs male of all except Archibald, he then says—"whom failing, to the heirs female of the body," beginning with the first and going through them all—of course omitting Captain Archibald. Then, when we come to the first power of providing for a wife, he says—"but with and under this exception always from the aforesaid limitations, that it shall be lawful to, and in the power of, the said Archibald Dickson, and the other heirs and substitutes above mentioned, upon their succeeding to the said lands and estate," and so on. I am not at all certain that the framer of this instrument, in casting his eyes over all the preceding limitations providing for heirs female, did not consider that he was referring the power to the persons whom he had thus enumerated, excluding Captain Archibald; because these limitations to the heirs female went right through every person who was to take, but altogether omitted Captain Archibald. When, therefore, the framer of the instrument said, that the other heirs and substitutes were to take as above mentioned, he might mean, and no doubt did mean, those who were above mentioned in the last list, which included all, omitting Captain Archibald.

But not relying upon that, the question is as to the true construction of the instrument, whether

the description of persons who are to take does not of itself shew that this power was never intended to be given, and was not, in point of fact, given to Archibald?

Now, the English cases (and the Scotch cases are to the same effect) have established clearly beyond all controversy, that, if younger children as a class are intended to be provided for, they who really stand in the position of younger children, although they may be elder children, one or more of them, by birth, yet are within the provision. Why is that? Because as a class they stand in the position of younger children. There may be half-a-dozen daughters born in a family, and then a son. The estate is limited to the son, and provision has to be made for the younger children. Whom would you in that case call younger children, speaking with reference to the estate? Why, all that class who could not, any one of them, take the estate itself, because they are younger than the person who takes the estate—that is, they are inferior, they are lower than the one who becomes the head of the family, and in that respect they are, as a class, the younger branches.

My Lords, it is a great stretch to make language bend to the intention. But a Court of Justice is never better employed than when, without breaking in upon any positive rule, it can make the strict words which it finds in an instrument bend to the real intention of the settler or of the testator. In all these cases the word 'younger' must necessarily be a correlative term. There must be some one who is older; or else what can it mean? Here the words are inaccurate, because it says "younger children other than the heir in the said lands and estate." The words "lands and estate," therefore, shew at once that what was intended was "other than the one who will take the estate." If you look to the form of an English settlement, giving the power of charging a portion for the younger children, you find it in these terms. It gives power to the tenant for life to charge portions for all and every the child and children other than and besides the eldest or other son for the time being entitled to the estate. That is the form in which a settlement is drawn in England. There, of course, it is to all the children other than and besides the eldest or other son for the time being entitled to the estate. Now it occurred to me, that the way in which this instrument has become inaccurate is probably this:—That the framer had found that the heirs female were provided for, and that therefore daughters might succeed to the estate, and that so puzzled him that he put in "younger children," as he saw that younger children might come in even as females. But then he says, "younger children not being the heir entitled to the estate." Well, then, what can that mean? Take the case which happened. Archibald had two children, a boy and a girl. Which is the younger child? We know which is the younger in point of birth. But how is she younger than the other with regard to the estate? Neither takes the estate. How could she take a portion as a younger child, if her elder brother could not take the estate himself? Therefore the learned counsel was reduced to this dilemma, either in effect to give up the case, or to insist that both the children were entitled to it. How can they both be entitled? How can they both be younger children? It is said that neither takes the estate. But that only shews that they were not children who came at all within the category. Because the son is not entitled to the estate the daughter herself cannot take, because the relation does not exist with reference to the estate between elder and younger. Consequently this is a power which never arose, and which therefore could not be exercised. I take it to be so clear that it would be a waste of your Lordships' time if I were to go further into the point. I cannot admit that it is open to doubt at all. I may, however, just observe, before I leave this point, with regard to the power to provide for the husbands and wives of those who succeed the heir, it is quite clear that this power was never intended to be extended to Captain Archibald, because he never could have any relations who answered that description. Therefore that power of itself shews that Captain Archibald is the only person intended to be provided for.

Then, with regard to the Aberdeen Act.—Of course it must be admitted that it is not necessary, in exercising a power given by that act, to refer to it. That is because it is the general law of the land. You need not refer to any such power, provided you shew, by the disposition of the property subject to the power, that you mean to exercise the power. In the Aberdeen Act, § 7, it is expressly provided, that where there is an excess in the exercise of the authority granted by the act, the heir cannot reduce that excess, and that the power shall not be void only for that excess. But then is it necessary to decide this question, whether, if a power did exist under the Aberdeen Act, that power could or could not be brought in aid of the exercise of this power? It is perfectly clear that this gentleman meant to exercise the power of settlement. It is equally clear that he meant to do the act. It is not more clear that he intended to exercise the power than it is that he meant to provide for his children. If, therefore, the question had now arisen—Whether, if he had power under the Aberdeen Act, the power could have come in aid of this disposition? that would have been a question upon which I should have desired further time for consideration. But I think that point does not arise in this case. I am clearly of opinion that, under the Aberdeen Act, the person who is the heir of entail, in a case such as this, has no right whatever to charge any portion for his children. I think that the words of the Aberdeen Act are quite as clear as the words in this case, and they shew to my mind perfectly

conclusively, that it was not intended that any man should have the power of providing for younger children unless he had a son, or one of his children who could take under the entail. It was intended as a provision for younger children standing in reference to the estate as younger children. The object of the provision is this, that when a man succeeds to an estate, and thus becomes the head of the family, he shall not find himself burthened with a parcel of poor indigent relations, but that there shall be some provision for the younger children, irrespective of the aid they might expect from the head of the family. But I should have gone a great deal further; and unless authority can be produced to the contrary, I should myself have said, that I have no doubt, under the Aberdeen Act, that no man, in the situation of Captain Archibald, as a mere liferenter, could, under this settlement, make a charge in favour of his younger children. Independently of the words of the settlement itself, I apprehend that the intention of the Aberdeen Act was to enable persons, taking regularly under the Entail Act, in the common way of limitation, to make such provision as is there pointed out for their younger children, and that it never could have been in contemplation to give to a mere liferenter, where there was no limitation to his heirs, the power given to him by this act of parliament. If it were so I should be glad to know where it would stop. Suppose that, instead of giving the property generally, (which would be the gift of a life-interest,) it had been given for ten or five years, or any certain number of years, where is the distinction? The Aberdeen Act speaks generally of the heir of entail, but it means in the common ordinary way in which such a limitation takes place. My own opinion, therefore, is, that this case does not fall within the Aberdeen Act, and therefore no question, as it appears to me, arises with regard to whether the power supposed to be vested in Archibald Dickson by the Aberdeen Act, could be considered as exercised or not by the instrument in question.

Upon the whole case, my Lords, I agree with my noble and learned friends that the appeal ought to be dismissed, and the decree of the Court below affirmed.

Interlocutors affirmed, with costs.

Kempson and Fletcher, *Appellants' Solicitors.* — Maitland and Graham, *Respondent's Solicitors.*

JUNE 15, 1854.

HER MAJESTY'S ADVOCATE, *Plaintiff in error, Appellant, v.* DAVID SMITH, *Defendant in error, Respondent.*

Legacy Duty—Change of Investment—*A testatrix left £4000 of personal property, and £16,000 on heritable bond. She directed her trustees to pay debts and legacies, and dispose of the residue thus:—"I direct my trustees to pay the whole residue of the said trust estate and effects to W. D., whom I hereby appoint my residuary legatee." The debts and legacies amounted to £13,500, so that it was impossible to discharge them without encroaching on the £16,000 bond. The trust deed contained power to uplift and change existing investments, and to convert the estate into money, in whole or in part. By virtue of this power the trustees uplifted the £16,000 bond, and having taken so much of the money as was required to satisfy the trust purposes, they reinvested upon heritage the residue, amounting to £6000, and claimable by W. D.*

HELD (affirming judgment), *that the residue was not liable in legacy duty,—the change of investment being simply in ordinary management, and for better preservation, and not a permanent change for distribution, so as to alter the conditional into an absolute direction to realize the estate.*[1]

The judgment of the Exchequer Court in Scotland was appealed against and sought to be reversed, for the following reasons:—"1. Because, on the true construction of the testamentary instruments of the testatrix, it was in her contemplation that the heritable bond for £16,000 be realized by her trustees, and the proceeds applied to the satisfaction of the specific purposes of the trust, and that the residue should be paid by them to the party named as residuary legatee. —*Angus* v. *Angus*, Dec. 6, 1825; *Burrel* v. *Burrel*, Dec. 14, 1825; *Advocate-General* v. *Ramsay's Trustees*, 2 C. M. & R. 224; *Do.* v. *Williamson*, 2 Bell's App. 89; 10 Cl. & F. 16. 2. Because the trustees were empowered to realize the heritable bond left by the testatrix, and they, in point of fact, exercised their power to do so. *Attorney-General* v. *Mangles*, 1839, 5 M. & W. 120; *Do.* v. *Simcox*, Jan. 18, 1848; 1 Exch. 749."

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[1] See previous report 14 D. 585; 24 Sc. Jur. 285. S. C. 1 Macq. Ap. 760: 26 Sc. Jur. 533.