MARTIN ET AL., ... APPELLANTS.
KELSO ET AL., ... RESPONDENTS.

1857. Feb. 24th, 26th, 27th. March 21st.

Construction. — *Entail.* — *Execution of Power.* — Circumstances under which it was held: 1. That the words "so often as apparent or presumptive heirs are females," did not exclusively mean daughters of the person executing a power, but might mean daughters of any one to whom the succession opened under the destination;

2. That the power given to the heir of entail in possession of selecting one of the heirs portioners to the exclusion of others, was a power of substituting the younger for the elder, not to the effect of giving her a liferent, but so that the right of succession might go to the heirs of her body under the entail;
3. That a deed *inter vivos* was not an improper form of executing the power;
4. That the power might be executed by the heir of entail in possession, precisely as if he were a proprietor in fee simple; and that no subsequent alteration of circumstances could defeat the execution.
5. *Lord Rutherfurd's Act.*—*Semble,* that the remedies under Lord Rutherfurd's Act, having a similar object, are to be worked out on the same principle as those which govern the English Fines and Recoveries Act.

THIS case, one purely of construction and exceedingly special, is reported at very great length as decided by the Second Division of the Court of Session on the 19th July 1853 (*a*).

The *Lord Advocate* (*b*) and Mr. *Rolt* appeared for the Appellants.

The *Attorney General* (*c*) and Mr. *Anderson* for the Respondents.

(*a*) Second Series, vol. xv. p. 950. (*b*) Mr. Moncreiff.
(*c*) Sir R. Bethell.

The facts and the points are fully stated in the following opinions delivered on the motion for judgment:—

Lord Chancellor's opinion.

The LORD CHANCELLOR (a):

My Lords, in this case there are two appeals against several interlocutors of the Court of Session, pronounced in the first instance in an action of reduction, brought by the Appellants, to reduce certain instruments mentioned in the summons; and, secondly, upon a summons called, whether correctly or incorrectly, a supplemental summons. The result of those interlocutors was to assoilzie the Defenders altogether.

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 state particularly of whom those consisted. Then there was a proviso, "that the eldest heir female and the descendants of her body, so oft as the succession shall

(a) Lord Cranworth.

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devolve upon females or their descendants," should exclude all other heirs portioners.

The settlement contained proper fetters against altering the order of succession, against alienation, and against contracting 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 show 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, 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, to himself and the heirs whatsoever of his body.

What does appear is, that some time prior to the year 1837, between seventy and eighty years after the date of the settlement, the estate had come into the possession of Colonel William Kelso as the heir of entail in posession under the deed of entail. Colonel William Kelso, being thus in possession, on the 4th of 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 Eleonora Kelso. Colonel William Kelso was a bachelor; and at that time his four heirs apparent were four sisters, of whom Miss Eleonora 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 devolve upon Mrs. Martin, as being the eldest of the heirs portioners. But in the deed of entail there was a clause declaring

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the entail to be made with this exception, "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 Eleonora 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 the 4th day of 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 Eleonora 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 Eleonora 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 Eleonora Kelso claimed to be the heir of entail by virtue of the original entail, coupled with the deed which had been

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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; 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 of April 1849, Miss Eleonora 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 this 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

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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 herself and the heirs whatsoever of her body; whom failing, to the said Mrs. Mary Susanna Kelso or Utterson, and the heirs whatsoever of her body." And then the estate was 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 the month of February 1850, Mrs. Martin, who was the eldest sister of Colonel William Kelso, and of Eleonora, 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 the month of March 1850, Miss Eleonora 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 of the 11th and 12th of Victoria, chapter 36, section 3 (*a*), 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 entail 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

(*a*) Lord Rutherfurd's Act.

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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 of 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 Eleonora Kelso, his aunt, had deprived him of his right; and upon certain grounds which he alleged, he prayed a decree of reduction of the deed executed by Colonel William Kelso, of the decree of declarator immediately following his death, of the instrument of sasine thereupon, of the deed made by Miss Eleonora Kelso in the year 1849, and of the proceedings which were taken under the Act of Parliament, 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.

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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 portioners, or only to lineal (*a*) 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 his 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 heirs portioners, sisters, or whether it was a power confined to the case of his having four apparent or expecting 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 presum-

(*a*) That is, heirs in the *direct* line of descent. A lineal heir may be in the direct or in the collateral line. A lineal line is a phrase not of clear meaning.

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tive 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 toan 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 it was only to give a life interest to the daughter or sister 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

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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 this point all the Judges of the Court below 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 that the alteration in the destination was made by the heir in tail 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

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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. My Lords, 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 in tail 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 should 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

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that might take place after he had so done could have any effect.

The question, I apprehend, is not embarrassed by the consideration pressed in the argument, namely, that this construction 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 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.

Then it was said,—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 executed by Miss Eleonora Kelso, though not a *mortis causâ* deed, was a deed strictly calculated to carry into effect the provisions or the intention of the original settlor, 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

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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.

The only remaining question, which was strongly argued upon at the bar, was a question upon Lord Rutherford'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 the recent Act of Parliament (*a*). That was done, and the circumstance that afterwards other persons may come *in esse*, whose rights as heirs of entail would over ride 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 the 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 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

(*a*) The 3 & 4 Will. 4. c. 74. the Fines and Recoveries Act.

into *esse* afterwards, would be entirely to defeat the object of that Act.

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Upon the whole, therefore, my Lords, 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's opinion.

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 the 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 Mc Gill or Kelso, on the 27th day of April 1764.

That deed entailed the lands of Dankeith to herself and her assigns; whom failing, to Captain John Kelso, and the heirs of his body; whom failing, to other heirs of entail therein specified; it being declared that the eldest *heir female* and the descendants of her body, so often as the succession shall devolve upon *heirs female* or their descendants, excluding all other heirs-portioners, and succeeding always without division, throughout the whole course of succession. Then there is a provision, 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 destinasion 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;

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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:* provided, nevertheless, that with respect to the whole other heirs of tailzie, the prohibitions to alter the course of succession shall have their full force and effect.

Colonel William Kelso was a descendant of the body of Captain John Kelso, and was his heir of entail in possession of the estate; and when he made the settlement which is in question on this supplemental summons, he had no issue. His presumptive heirs were his sisters, namely, Mrs. Martin (the Pursuer's mother the eldest) Margaret Kelso, Mary Susanna Utterson, and Eleonora Kelso, who all, except Mrs. Martin, survived him. He on the 4th April 1837, proceeding on the powers of alteration contained in the original deed of entail, executed a deed of that date, by which he called his sister, Eleonora Kelso, and the heirs of her body, first to the succession of the estate of Dankeith, failing heirs of his own body.

Then there is a clause in that deed: "If it should be held that I am not entitled, under the power granted by the said deed of entail, to call the heirs of the body of the said Miss Eleonora Kelso to succeed after herself, and before the other heirs whatsoever of the said Captain John Kelso, then and in that case, I declare that this deed shall take effect to the extent only of calling the said Miss Eleonora Kelso herself to succeed me in the said estate, in preference to her sisters and their children; and in that case also I recal and annul the destination before written, in so far as it calls the heirs of the body of the said Miss Eleanora Kelso immediately after herself."

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

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the apparent, or presumptive, heirs female, are other than daughters of the heir of entail in possession? the second, 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, because relaxing them, 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 words "*a* daughter," which follow, are 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 females, 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 the placing the younger in the like position as the elder, so that the right of suc-

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cession 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.

Was the deed, which was *inter vivos* and not *mortis causâ*, an improper form of executing 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

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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 the 4th of 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 deed of disposition, by Miss Eleonora Kelso, of the 14th April 1849? Is this subject to objection upon any of the grounds alleged?

There are three objections urged against it. First, that Miss Eleonora 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 provisions to alter. This objection, indeed, was not much pressed.

Second, 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 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 Eleonora Kelso there were not three sisters surviving.

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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 *then* been executed. I certainly have felt the same doubt upon this point which has embarrassed some of the Judges of the Court of Session, and am not entirely free from it at this moment (*a*). 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 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 imply 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 in 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

(*a*) In course of the argument Lord Wensleydale said, "Suppose the donee of the power, after executing the deed, had ten children: would they be disinherited?" The Lord Chancellor asked, "If Colonel Kelso had a son, would the appointment become inoperative?" The Attorney-General: "These questions, we submit, do not arise."

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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:* Will your Lordships allow me, upon the question of costs, to recal the attention of the House to this circumstance, that upon one or other of the points we raised we had four of the five Judges in the Court below with us, Lord *Cockburn* being the only Judge who was against 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. 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.

Mr. *Attorney-General:* My Lords, we did not desire these proceedings in order to get a good title; and as for the judgment, all the learned Judges were against them, 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.

The *Lord Chancellor:* I think the losing party must pay the costs.

Lord *Wensleydale:* It must be so, I think.

Interlocutors affirmed, with costs.

GRAHAME, WEEMS, AND GRAHAME—RICHARDSON, LOCH, AND McLAURIN.