DICKSON ET AL., ... APPELLANTS.

DICKSON, ... RESPONDENT (*a*).

1854. 12*th and* 13*th June.*

Intention — Construction. — In Courts of Justice the word "intention" means such intention only as can be deduced from construction.

Where the language of an instrument, though slovenly and inaccurate, shows what is meant, the Court will make the language bend to, and execute, the intention.

Younger Children.—The word "younger," applied to classes of children in a settlement, is construed to mean posterior, or lower, in point of limitation. Thus where there is a provision for younger children, daughters will be included, though older than the son taking the estate.

By the expression "Younger Children" is in fact meant the unprovided for branches of a family.

Power or Faculty.—A deed of Entail contained a power to make provision for younger children other than the child who should take the Estate; but one of the Tenants in tail had only a life interest given to him by the Entail—the Estate on his death passing away from his children to another set of heirs: *Held* that *elder* and *younger* were correlative terms; and that as none of his children could take the Estate, so none of them could be objects of the power.

Semble—That the Aberdeen Act 5 Geo. IV. c. 87, could not be applied to such a case; for the power conferred by it to make provision for *younger* Children implies that the *elder* takes the Estate.

THE deed of entail in the pleadings mentioned, gave a power or faculty to grant bonds of provision to

(*a*) Reported in the Sec. Ser., vol. xiii. p. 1291 (3 July 1851).

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younger children *other than the heir taking the estate.* Major Dickson was an heir of entail, but for life only. None of his children were called to the succession, and the estate on his death passed to a different set of heirs. He had two children, a son and a daughter; and the question was whether an attempted execution in their favour of the power or faculty was valid. The Court of Session held that it was not. The children appealed.

Sir *Fitzroy Kelly* and Mr. *Rolt*, for the Appellants.

The *Solicitor-General* (Sir *Richard Bethell*), and Mr. *Anderson*, for the Respondent.

Lord Chancellor's opinion.

The LORD CHANCELLOR (*a*):

This case has been said to involve a question of intention. But, my Lords, if by "intention" is meant something different from construction, then I should say that this is not a question of intention,—for only in so far as you can deduce intention from construction is it a question of intention.

Major Dickson had two children, a son and a daughter; and the argument of the Appellants is, that having succeeded to the estate, he had a power of granting a bond of provision to these children. Under the entail 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." The expression, though inartificial, clearly means children younger than the child who shall be the heir.

Now it has been well settled by decisions in this country (and the same rule, for the same reason, holds in Scotland) that the word "younger" in a settlement of this sort, means posterior in point of limitation—not

(*a*) Lord Cranworth.

younger in point of age. As was observed by one of the learned Judges (*a*) in the Court of Session, you would let in all mankind unless you confined the expression to a class, some one of whom might be the heir. Now none of the Major's family can by possibility fill that character.

But there was an ingenious suggestion that although this appointment might not be good under the provisions of the deed of entail, yet it was valid by virtue of Lord Aberdeen's Act (*b*), which authorises every heir of entail in Scotland, if he is so minded, to make provision for his younger children by means of a bond—not it is true quite to the same extent as is allowed by this entail; but to an extent short of that. Now, the circumstance that here the provision was extended to three years rent, whereas under the statute it was confined to two, would not have made the appointment bad. But Major Dickson did not suppose himself to be executing any authority under the statute. He confines what he does to that which he is authorised to do under the entail. This is not a distinction of form, but of substance. For when we look to what is the course of operation under the deed, as contra-distinguished from the course prescribed 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) cannot apply to a case where the party not only never intended to execute the power, but never meant to do the thing which the power under the statute authorised to be done.

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 in express terms purported to have been done under Lord Aberdeen's Act,

(*a*) Lord Cockburn. (*b*) 5 Geo. IV. c. 87.

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there would not have been just as valid an objection to his executing the power under the statute as there is under the deed.

The Lord BROUGHAM:

Lord Brougham's opinion.

I entirely agree.

The entailer was cognizant not only of the existence of his relation whom he calls Captain (now Major) Dickson, but also of the fact of Major Dickson having two children, a son and a daughter; for whom he makes provision by a separate instrument. Then, not by mistake or by omission, but knowingly and willingly, he excludes the children—the heirs of the body of Major Dickson from the succession to this entailed estate, and he gives it to the other heirs, whom he calls to the destination in their order.

My Lords, I take the words "to the younger children other than the heir" to mean such of the children of the heirs of entail successively coming into possession of the entailed estates as should not succeed to the entailed estates. Now none of the children of the Major could succeed to the entailed estates, and none of his children therefore could come within the description referred to in this power.

My Lords, with respect to the Aberdeen Act, I agree with what the *Lord Justice-Clerk* (*Hope*) well observed, that it is not necessary to set forth in an instrument executing a power that it has been framed in execution of that power. Nay, I can conceive that a power afterwards accruing to the party making the instrument might perhaps validate that which at the time of its execution was invalid. But upon a question as to two powers or faculties, one of them being expressly stated by the party to be the one under which he executes it, I know of no case in which the other power, unthought of by him, has been held to validate the

instrument. Now here 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." The difference between three years and two years would not be at all material, except as an additional reason for holding that Major Dickson 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 was doing an entirely different thing from that which the Aberdeen Act entitled him to do.

Lord Brougham's opinion.

Upon the whole, therefore, I have no doubt whatever that the Court below has rightly decided this case.

The Lord ST. LEONARDS.

Lord St. Leonards' opinion.

The question is one of mere construction; and I cannot say that I have entertained any doubt upon it from the first moment that I understood the case.

It is very unusual in an entail to find a mere life-renter introduced. But it evidently did not happen here *per incuriam*. The instrument, I should say, is precisely what the settlor meant, as regards the limitations.

Then did he intend, by the words used, to include Archibald (*i. e.* the Major) in the "faculty," which I shall take the liberty of calling the "power?" Does it, or does it not, include Archibald? Nobody has attempted to deny that the settlor could have given the power to Archibald if he had chosen to do so. Therefore if he had said in so many words that Archibald should have this power, of course he would have had it. The question is whether the description of persons who are to take does not of itself show that this power was never intended to be given, and was not in point of fact given to Archibald.

The English cases (and the Scotch cases are to the

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same effect) have established 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. Because they are inferior; they are lower than the person who becomes the head of the family, and in that respect they are regarded by the law as the younger branches.

This is a great stretch to make language bend to and execute the intention. But, my Lords, a Court of Justice is never better employed than when, without breaking in upon any positive rule of law, it makes the language of an instrument comply with the real intention of the settlor or testator (*a*).

In these cases the word "younger" is correlative. The deed says "younger children, other than the heir in the said lands and estate." The words "lands and estate" show that what was intended was other than the one who would take the estate. If you look at the form of an English settlement giving the power of charging a portion for the younger children, you find that 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. Now Major Archibald

(*a*) The words "Younger Children" have received a prodigious latitude of construction to answer the occasions of families and the intent of parties. Per Lord Hardwicke. 2 Ves. Sen. 210.

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Dickson never had this power, because he could not have children coming within the category. He was himself the only person intended to be provided for.

The Aberdeen Act being the general law of the land, it is not necessary in exercising a power given by that statute expressly to refer to it, provided you show that you really mean to exercise the power. It appears to me, however, that it was not intended that any man should have the power which the Act confers, unless one of his children could take under the entail. It was intended as a provision for younger children, that is to say, children standing with reference to the estate in the position of younger children. And unless authority can be produced to the contrary, I should myself incline to hold that no man in the situation of Major Archibald Dickson could by virtue of this Act make a charge in favour of his younger children. Persons taking regularly under the entail, *in the common way of limitation*, may make provision for their younger children—but I do not think that it was meant to give the power to a mere life-renter. If it were, I should be glad to know where the power would stop. Suppose that the property had been given for a term of years only; say for ten or five years. Would the power exist in such a case? I should say most unquestionably not. The question, therefore, as to the power given by the Aberdeen Act does not I think arise in the case of Major Archibald Dickson; for his interest was not, as it appears to me, of the kind contemplated by the statute.

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.

Interlocutor affirmed, with Costs.

KEMPSON & FLETCHER—MAITLAND & GRAHAM.