

CASES
DECIDED IN THE HOUSE OF LORDS,
ON APPEAL FROM THE
COURTS OF SCOTLAND.
1841.

[9th February 1841.]

ANTHONY DIXON and others, Appellants.¹

(No. 1.)

[*Sir W. Follett.*]

ELIZABETH DIXON, Daughter of the deceased Jacob
Dixon junior, and her Curator, Respondents.

[*S. S. Bell.*]

Provision to Children — Legacy — Conditio si sine liberis decesserit. — A testator left a mortis causâ settlement for the distribution of his whole heritable and moveable estate, containing provisions to his several children; in some instances the provision being payable to the particular child nominatim, in other instances to the child and to his or her heirs; the testator left the residue of his estate to his eldest son nominatim, without mention of his heirs, although he was in the knowledge that the eldest son had children living; the eldest son predeceased the testator: — Held, in a question betwixt the younger children of the testator and the children of the eldest son

¹ 14 D., B., & M., 938; Fac. Coll., 10th June 1836.

(affirming the judgment of the Court of Session), that the provision in favour of the testator's eldest son did not lapse, or fall to the heirs ab intestato of the father, by the eldest son predeceasing his father.

2d DIVISION.

Lord Ordinary
Jeffrey.

Statement.

JACOB Dixon senior, of the Dumbarton Glass Work Company, by a general trust disposition dated in November 1824, conveyed his whole heritable and moveable property to trustees, for the payment, first, of his debts, and, secondly, of the following provisions to his children; viz. “ To Anthony Dixon, my second lawful son in life, “ and the heirs of his body, the sum of 2,800*l.*, which, “ with 1,200*l.* which I have already paid and advanced “ for my said son, for outfitting him and putting him “ in business, make up the sum of 4,000*l.* sterling, “ which I intend to be the amount of his provision as “ one of my children:” Further, “ To Joseph Dixon, “ my third lawful son now in life, and to the heirs of “ his body, the sum of 1,500*l.*, which, with the sum of “ 2,500*l.*, already advanced to him or paid by me on “ his account, makes up the sum of 4,000*l.* sterling, “ which I intend to be the amount of his provision as “ one of my children:” Further, “ To Elizabeth “ Dixon, my eldest lawful daughter, spouse of the “ Rev. William Jaffray, minister of the gospel at Dum- “ barton, and to the heirs of her body, the sum of “ 1,500*l.* sterling, which, with the sum of 1,500*l.* which “ I have already paid and advanced to my said daughter “ and her said husband, makes up the sum of 3,000*l.*, “ which I intend to be the amount of her provision as “ one of my children:”

Also, “ To Louisa Dixon, my second lawful daughter, “ the sum of 3,000*l.* sterling, and to Catharine Ann

“ Sophia Dixon, my youngest lawful daughter, the like
 “ sum of 3,000*l.* sterling.”

Then followed a bequest to the testator's eldest son,
 to the following effect: “ I appoint my said trustees to
 “ convey, deliver, and make over to Jacob Dixon, my
 “ eldest lawful son, the residue of my said means and
 “ estate, after satisfying the provisions and others above
 “ mentioned; and that as soon after my death as my
 “ said trustees may have recovered and laid aside sums
 “ sufficient for satisfying the provisions, annuities, and
 “ others provided by this deed, and the relative sup-
 “ plementary deed before mentioned, care being always
 “ taken that my said eldest lawful son shall not receive
 “ less, out of my means and estate, than the sum of
 “ 6,000*l.* sterling or the value thereof; which provisions
 “ so to be paid to my said children shall be accepted by
 “ them, and the same are hereby declared to be in full
 “ of all legitim, portion natural, bairns part of gear,
 “ share of goods in communion, executry, and others
 “ whatsoever, which they or any of them can ask or
 “ demand by and through my death, or the death of
 “ their deceased mother; declaring, that if any of my
 “ said children shall quarrel or attempt to impugn this
 “ deed of settlement, or the relative supplementary
 “ deed before referred to, by process of reduction or
 “ otherwise, upon any ground whatever, then it is my
 “ will, and I hereby declare, that such child or children
 “ shall amit, lose, and forfeit all rights, claim, or interest
 “ which he, she, or they would otherwise have under
 “ the trust-deed and settlement; and in that event, I
 “ hereby recal the provision or provisions made by me
 “ in favour of such child or children.”

Previous to the making of that settlement the testator

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had allotted to his eldest son, Jacob Dixon junior, a fourth share or interest in the stock of the Glass Work Company, without the son making any advance, and on which stock Jacob Dixon junior, as was alleged, realized considerable profits. Jacob Dixon junior had also, with the father's knowledge, legitimized certain children by a marriage with the mother, who was of inferior rank in life. The terms on which the testator and his son stood in respect to treatment or recognition of these grandchildren were disputed, but the testator's knowledge of the existence of such grandchildren was admitted.

Jacob Dixon junior died on the 25th September 1831, predeceasing the testator, who died the day following. The other children survived their father. The accepting and acting trustees under the settlement were the testator's sons, Anthony and Joseph Dixon.

Thereafter, Anthony Dixon, and, with the exception of Mrs. Jaffray, the other children of the testator, as four of the nearest of kin, raised an action against the widow and children of Jacob Dixon junior, the residuary legatee under the settlement, setting forth the provisions of the deed, the state of the family of Jacob Dixon junior, and his predeceasing his father, and concluding to have it found and declared that the residuary legacy in favour of Jacob Dixon junior lapsed and became void by his predeceasing the testator, and did not transmit to his children, but that Jacob Dixon senior died intestate quoad the succession to the free residue of his estate, which residue the trustees were bound to make over to the pursuers, as his legal executors and nearest of kin.

Among other defences it was pleaded that the provision in favour of Jacob Dixon junior did not lapse by his predeceasing the testator, but implied a conditional institution in favour of his children, and that the defenders were entitled to claim the said provision.

The Lord Ordinary, after hearing parties on the closed record, pronounced, 24th February 1836, the following interlocutor, adding thereto the subjoined note :¹

“ The Lord Ordinary having resumed consideration
“ of the debate, with the closed record and whole

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¹ “ *Note.*—Holding the *conditio si sine liberis* to depend on the *præsumpta voluntas* of the testator, there probably have been few cases
“ where, on the whole matter, there were so strong reasons for applying
“ it as the present. The only circumstances which could give a colour
“ to the claim of the pursuers, are, 1st. That the father was aware, when
“ he made his settlement, that his eldest son had children; and 2d.
“ That, in providing for such of his other children as had issue, he has
“ expressly called the heirs of their bodies as conditional institutes, but
“ left his provision to the eldest son individually, and without any such
“ addition. In an ordinary case, these circumstances might be of
“ moment, and it is with a view to obviate their effect that the Lord
“ Ordinary has brought into notice the other circumstances which are
“ stated in the body of his judgment; and taking them all together, as
“ elements in the complex question as to the real or presumed will of the
“ testator, he thinks it cannot be reasonably doubted how that question
“ should be decided.

“ The existence of children at the date of the settlement is not of
“ much weight *per se*, and has often been disregarded in cases of this
“ kind. The variance of style in the provisions for the other married
“ children, and for the eldest son, is no doubt much more material, and
“ in some cases has been held conclusive as to the presumed intention of
“ the testator; and even in the present case it would present great diffi-
“ culties, if the eldest son had stood in the settlement, in the same line
“ or rank with the other children, that is, as a proper or special legatee
“ for a definite sum of money. But though this is their condition, his
“ is fundamentally different. He is not a legatee in the proper sense at
“ all, but the general heir or successor to the father’s whole estate, bur-
“ dened only with the special legacies to his brothers and sisters, or the
“ heirs of their bodies, and insured even against those encroaching on his
“ inheritance beyond a certain amount. It might be very natural, there-
“ fore, for the father to express his intention of continuing those special

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“ process, in respect that the question relates to the
“ construction and effect of a general family settlement

“ burdens on his general succession in favour of the issue of his other
“ children, while he considered no such intimation necessary, as to the
“ more comprehensive and final destination of that succession to his
“ eldest son.

“ It is impossible to read the settlement, with its codicils, without
“ seeing that it was the testator’s enixa voluntas not to die intestate with
“ regard to any part of this property; and when the concluding words
“ of the deed are attended to, along with the necessary effect of sus-
“ taining the claims of the pursuers, it is apprehended that, if effect is
“ to be given to that will and intention, those claims must be rejected.
“ The deed not only leaves the whole residue to the eldest son, but
“ expressly provides, that the portions allotted to the children shall be in
“ full of all legitim, executry, and all that they could ask or claim
“ through his (the father’s) death, or that of their mother; and further
“ declares, that if any of them shall in any way quarrel or object to the
“ settlement, they shall forfeit all right under it. Now, though this
“ clause may appear, in words, to apply to the eldest son as well as the
“ other children, it is manifest that in substance and effect it can apply
“ to them only; since the eldest son is made successor in universum jus
“ of the father, and could never, therefore, be paid off or satisfied of
“ his legal rights by the tender of any specific sum. The meaning of
“ the clause, in short, is plainly to exclude and extinguish any claim on
“ the part of the other children or next of kin, as heirs-at-law (in mobi-
“ libus) of the father. But it is impossible to give it this effect as
“ against the eldest son, who, by the very terms of this deed, is made
“ heir-at-law and universal successor to the father, under the burden only
“ of their provisions, which are thus limited and conditioned for his sole
“ and exclusive benefit. But the pursuers of this action are those other
“ children, and the claim now insisted in by them is, that as heirs-at-law
“ they shall take beyond what they are limited to by the terms of the
“ deed, and make an intestate succession, by denying that there is any
“ ground for presuming that this was in any way contrary to the wish
“ and intention of the testator.

“ From what has now been said, it will be easily seen that, in the view
“ the Lord Ordinary takes of the matter, the cases in which the conditio
“ si sine liberis merely prevents a partial intestacy (where the deceased
“ has settled his whole property by deed), and excludes only the heirs-
“ at-law, to whom nothing is there provided in that character, are far
“ more favourable cases for its application, than where its effect is to
“ disappoint and exclude nominatim substitutes, who are preferred to
“ such heirs-at-law, and expressly pointed out in the deed as next in the
“ testator’s favour to the parents of the children who are, notwithstanding,
“ allowed to exclude them; and the grounds of this opinion are thought
“ to be too obvious to need explanation. It was not without some sur-

“ by a father upon his children, by which it is manifest
 “ that he intended his whole succession to be regulated,

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“ prize, therefore, that the Lord Ordinary found the pursuers main-
 “ taining, at the debate, that the case which here occurs was the least
 “ favourable for the application of the condition in question; and that
 “ it was even inadmissible, except where introduced to disappoint an
 “ express substitution.

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“ The argument seemed to be very much rested on the circumstance
 “ of the principle of extending a provision for a parent to his children,
 “ though not mentioned, being generally described as a condition; which
 “ it was said implied that there must be some ulterior destination to be
 “ affected by such condition; and that this was not the case where, on
 “ the failure of the legatee named, the provision merely fell back into
 “ the general estate of the testator. In all this, however, it seems to
 “ the Lord Ordinary that the true reason and principle of the law is
 “ overlooked for a mere verbal subtilty. It is impossible to reflect for
 “ a moment on that principle, without seeing that the only question in
 “ all such cases is, whether there is sufficient ground for holding that the
 “ testator truly wished and intended that a provision made to an indi-
 “ vidual should, on his predecease, go to his surviving children, though
 “ not named in the bequest, rather than to that person (whoever he might
 “ be) to whom it must have gone, if there had been no such children?
 “ There must always be some one, to whom, in that case, it would have
 “ gone; and whether that person was a nominatim substitute, or the
 “ next of kin of the testator, is plainly a matter of indifference; except
 “ as affording more or less ground for concluding as to the testator’s
 “ probable intention; and in that view it seems impossible to doubt that
 “ the interest of a nominatim substitute, who is named to the prejudice
 “ of the next of kin, must have been more tenderly regarded by the
 “ testator than his next of kin, who is excluded. If the children, there-
 “ fore, are allowed to cut out the nominatim substitute, it would be
 “ strange if they should fail as against the next of kin. Whether they
 “ are properly described as succeeding in either case, by virtue of an
 “ implied condition on the succession of those who must take, if they do
 “ not, or whether this is less of the nature of a condition, where the
 “ persons so taking claim only on the hæreditas jacens of the testator, are
 “ matters which do not seem at all to touch the plain principle upon
 “ which they do succeed, and resolve rather into criticism on the lan-
 “ guage used in law books in relation to this rule of law, than argu-
 “ ments as to the grounds of its application. If the heirs-at-law had
 “ been actually called, by a form of words importing a substitution, is it
 “ possible to suppose that this would have given the children of the
 “ predeceasing eldest son a better right to exclude them, than if they
 “ had been passed by altogether, and never once named (in that cha-
 “ racter) in the settlement? and yet this is the argument of the pursuers.
 “ If the testator had said, ‘and failing my said eldest son, I direct the

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“ and to leave no part of his property to the distribution
“ of the law : And farther, in respect that by the said
“ settlement the eldest son is evidently the persona
“ prædilecta, and that his share is not, like that of the
“ other children, a definite sum or portion, in full satis-
“ faction of all legal claims, but the whole residue of
“ the estate, after paying the proportions of the other
“ children, and even guaranteed, at the expense of those
“ portions, to the extent of a minimum greatly exceed-
“ ing the maximum of what is thus provided to each of
“ the other children : Finds that the provision so made
“ in favour of Jacob Dixon the younger, the testator’s
“ said eldest son, did not lapse, or fall to the heirs ab-
“ intestato of the father, by the said eldest son having
“ predeceased his said father by a few hours ; but that
“ the principle of the implied condition, *si sine liberis*
“ *decesserit*, carries the whole right and benefit of the
“ said provision to the defenders in this action, the
“ surviving children of the said Jacob Dixon the
“ younger, as conditional institutes in the same, and

“ ‘ provision hereby made for him to be divided equally among my next
“ ‘ of kin,’ the pursuers admit that they would have been excluded by his
“ surviving children. But they contend that the children have no claim
“ in this case, because the next of kin are not called at all in the settle-
“ ment ; and that their taking any thing in that character is, indeed,
“ anxiously precluded. To the Lord Ordinary it seems impossible to
“ give any weight to such an argument, of which he can find no trace
“ in any former case on this subject. On the contrary, it appears that
“ effect was given to the principle, as against heirs-at-law, in one branch
“ at least of the case of Wallace, 28th January 1807 (Morr. App., voce
“ Clause, No. 6.), and in the very recent case of Wilkie against Jackson,
“ which was decided last week by the First Division, adhering to an
“ interlocutor of Lord Corehouse of 30th June 1835. That last case,
“ indeed, presented both the grounds of difficulty on which the pursuers
“ rely in the present, the children who prevailed having been in existence
“ at the date of the settlement, and the provisions to the other children,
“ in the same deed, being taken expressly to their heirs, while those to
“ their mother were only given to her individually.”

“ therefore sustains the defences, assoilzies the said de-
 “ fenders from the whole conclusions of the action, and
 “ decerns: Finds them entitled to expenses, allows an
 “ account thereof to be given in, and remits the same,
 “ when lodged, to the auditor, for his taxation and
 “ report.”

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The pursuers reclaimed.

At the hearing of the reclaiming note, the counsel for the respondents was understood to abandon the ground taken by the Lord Ordinary, in so far as the case was treated as falling under the rule or condition *si sine liberis decesserit*; and the Court also thought that the defence stood much better on the presumption of *pietas paterna*, by which the grandchildren — their parent predeceasing — are admitted to such parent’s share; and that the circumstances here were insufficient to overcome that presumption. The Court accordingly pronounced the following interlocutor:

“ The Lords adhere to the interlocutor of the Lord
 “ Ordinary submitted to review, in so far as it finds
 “ that the provision made in favour of Jacob Dixon
 “ the younger, the testator’s eldest son, did not lapse, or
 “ fall to the heirs ab intestato of the father, by the said
 “ eldest son predeceasing his father, and assoilzie the
 “ defenders from the whole conclusions of the action,
 “ and find them entitled to expenses, and find additional
 “ expenses due.”

Judgment of
 Court,
 10th June 1836.
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The pursuers appealed.

Appellants. — If the instrument is to be construed according to the expressed intention of the testator, it would follow that the residue of his estate, forming

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part of the general settlement, has, by supervening circumstances, fallen to the other children as the nearest of kin. The testator having in the case of his eldest married daughter and his two younger sons provided for their representatives in the event of the parent predeceasing, it must necessarily follow, in regard to the eldest son and the two unmarried daughters, that effect must be given to the terms of the trust settlement, the general rule of law being that a legacy to a party nominatim, without mention of heirs or successors, will lapse by the predecease of the party.

Again, if implied intention or presumption is to be looked to, it will be found that no such presumption has been recognized in our law; but if it has, that the circumstances here are sufficient to rebut such presumption.

The *conditio si sine liberis decesserit*, borrowed from the Roman law, applies where a testator makes a bequest to his son, with an ulterior substitution to a third party in case of the death of the legatee; but the condition on which such substitution is meant to take effect flies off in the event of the legatee leaving children,¹ the principle being that if the testator had thought he would have grandchildren, it is not likely that he would have disappointed their succession by substituting a stranger, to his son the legatee: “*Intelligentem non esse verisimile, patrem, si de nepotibus cogitaverit, talem fecisse substitutionem.*”² But the judges, while they rejected the

¹ Dig. lib. 35. tit. 1. l. 102; Cod. lib. 6. t. 25. l. 6; Cod. lib. 6. t. 42. § 30.

² Cod. lib. 6. de Inst. & Sub.; Voet. lib. 36. t. 1. § 17, 18, & 19; Mantica, de Conject. Ultim. Volun. lib. 10. tit. 8. § 9; Grassus, Recept. Sentent. lib. de Fideicom. quest. 25.

application of the principle *si sine liberis* to the present case,¹ adopted a principle equally foreign to our law; viz. the presumption of *pietas paterna*, which proceeds on the notion that a father does not intend to leave grandchildren unprovided for, in the event of the predecease of their parent. Certainly no such exception to the general rule of lapsing of legacies is noticed by our institutional writers. Erskine² puts the rule broadly, that bonds of provision like legacies are personal to the child, and consequently fall, if he die before the grantor. By the law of England there can be no doubt about this case; it would be held the common case of a legacy lapsed.³ The cases founded on by the Respondents, commencing with that of the Magistrates of Montrose *v. Robertson*,⁴ rest on a different principle. In these, the provision is not of the nature of a legacy, but is truly a debt. In such cases the debt or provision vests in the creditor before the death of the grantor or testator. It may be a gratuitous obligation, but it is not dependent upon the survivance of the donee; if the donee predecease the grantor, the heirs take by descent from him, and not as conditional institutes in their own original right. *Wood v. Aitcheson*, 26th June 1789⁴, much relied on, is an example of this; and although the rule was, that a settlement made by a testator upon strangers was voided by the testator afterwards having children of his own, yet, if the testator became aware of the existence of his own children, and made no alteration on his settlement, the rule was held not appli-

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¹ See Rep. in Fac. Coll., & D., B., & M.

² Ersk. 3. 9. 9.

³ 2 Williams Executors, 873.

⁴ See Respondent's argument, p. 18.

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cable.¹ The result of the cases now referred to shows, that the principle of *pietas paterna*, if recognised, only applied in very favourable cases.

But supposing that the presumption of *pietas paterna* has been admitted into our law, it is clear that it ought to be received, and in truth has been received, as liable, like other presumptions, to be rebutted or overcome by circumstances, necessarily creating the presumption of a contrary intention; and so it was held by Lord Glenlee, in his remarkable expressions in *Colquhoun v. Campbell*, 5th June 1829,² by Lord Succoth, in *Baillie v. Nelson*, 4th June 1822,³ and by Lord Corehouse, in *Greig v. Malcolm*, 5th March 1835,⁴ who says, “the presumption
“ may be defeated by opposite presumptions or evidence;
“ and there can be no stronger evidence to that effect
“ than a clause in the settlement by which the testator
“ does make a provision for the issue of predeceasing
“ legatees, because it incontestibly shows he had them in
“ view when he made the substitution.” Unquestionably a position so clearly expounded loses none of its weight by other decisions of Lord Corehouse, founded on different circumstances, and wherein the truth of the maxim was not called in question. Another valuable rule of construction is, that presumed intention, like express intention, ought to be gathered from the words of the instrument, and not from conjecture, or by adopting latent rules or presumptions not known perhaps to

¹ *Yule v. Yule*, 20th Dec. 1758, Mor. 6400; 1 Bank. p. 227; Ersk. 3. 8. 46; *Watt v. Jervie*, 30th July 1760, Mor. 6401; *Oliphant v. Oliphant*, 19th June 1793, Mor. 6603; *Leitch v. Leitch*, affirmed 17th July 1829, 3 W. & S. 366.

² 7 S. & D. 709.

³ Fac. Coll.

⁴ 13 S., D., & B., 607

the testator. It was said the testator might by express words have excluded the Respondents, but is not the including the heirs, where he really meant such to take, a stronger and more convincing mode of expressing an intention to dispose?

But it is said the circumstance of the knowledge of the son's children here is entitled to little weight; although another material circumstance, the variance in the provisions to some of the other children, is confessedly of more importance. It is not a judicial mode of construction to look at each of these circumstances per se; both circumstances, admitted to be of more or less weight, ought plainly to be looked at in combination, as matter of evidence, and along with the other facts in the case, such as the circumstance of the eldest son being already adequately provided for,—and the unlikelihood that the testator, while he might wish his eldest son to get the residue if he survived and carried on the business, should mean, at the expense of his own younger children, to enrich the family of a son capable of providing for such family.

None of the cases cited adversely come up to the present. *Roughheads v. Rannie*, 14th February 1794,¹ is subject, among others, to this observation, that in so far as related to the presumed intention of the testator, William Craig, it is to be remarked, that his daughter Jean, and indeed his other daughters, had no children during the testator's life. It might, therefore, very well be presumed, in conformity with the Roman principle, that the testator had not adverted to the contingency of their having children, and that

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¹ Mor. 6403.

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if he had adverted to it, he would have expressly preferred those children to their deceasing mother's share of the provision. *Nelson v. Baillie*¹ was a case of express intention improperly worded. It is very evident that, in that case, the testator had intended to call, not only his two daughters, but their heirs, or at least the heirs of their bodies, or their children. This appears from the use of the word "foresaids" in the subsequent clause. This relative plainly implied an antecedent which had, per incuriam, been omitted. The omission was thus supplied in the judgment of Lord Hermand²: "The word foresaids in the deed, clearly means the heirs of the daughters; and the term children appears to have been omitted per incuriam." In *Wilkie v. Jackson*³ it did not appear from the record how long the testator had survived the death of his daughter, Margaret Jackson or Wilkie. It was not stated or averred that he ever knew of the existence of her children. Far less was it alleged that, at the date of the settlement, any of her children were in existence. The Lord Ordinary, therefore, is mistaken in supposing that this specialty formed any difficulty in the case. Nor is his Lordship's observation quite correct as to the other specialty. There was not so much a contrast between the terms of the provisions left to the other children and the provisions left to Margaret Jackson, as a distinction, apparently unaccountable, between the terms in which one of the provisions to Margaret Jackson was left, and the terms of the other three in her

¹ 1 S. & B. 458.

² Shaw's Rep., 2d ed. p. 427, notes.

³ 14 D., B., & M., 1141; not rep. in Fac. Coll.

favour. The provision last in order was left to her, her heirs and assignees, whilst, in regard to the three former, heirs and assignees were not mentioned. This distinction could hardly be referred to a difference of intention in the mind of the testator, as to the quality of the several provisions left to one and the same daughter. It was rather to be concluded that the testator had intended the whole to go to heirs and assignees, although he had not thought it necessary, or, perhaps, per incuriam had omitted, to repeat the destination separately, as to each of the provisions. This supposition was very much confirmed by the general clause which was subjoined to all the provisions: “And which provisions above written, in favour of my younger sons and daughters, and theirs above named, &c., are hereby declared to be real burdens affecting the foresaid lands, teinds, and others.” Here it will be observed that the words “and theirs above named” (which plainly means their heirs and assignees above named,) were referred indiscriminately to all the provisions both of the sons and the daughters. But really the point was not decided. The defender originally pleaded two defences. 1st. He maintained that the provisions in favour of Margaret Jackson had lapsed by her predecease, and thus never had been due at all. 2d. He maintained that, from a variety of documentary evidence, as well as from the lapse of time, it must be presumed that these provisions had actually been paid or satisfied. These two defences were not very consistent with each other; and it soon became evident that the defender must make his election between them, and by abandoning one of them, strengthen his defence upon the other. His course, it is believed,

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was a good deal influenced by the terms of the Lord Ordinary's interlocutor in the Outer House.¹ When the cause came before the Inner House, upon reclaiming notes at the instance of both parties, the defender gave up the first defence; and thus the point of law as to the supposed lapsing of the provisions was never pressed to a decision in the Inner House.

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Respondents. — By a rule of the law of Scotland, borrowed from an analogous rule of the Roman law, it has been fixed that a legacy or provision granted by a father or grandfather to his child or grandchild implies a conditional institution in favour of the issue of such child or grandchild; and accordingly, where a substitution in favour of others has been made, such substitution is construed and held to have been granted under the implied condition, *si sine liberis decesserit*; that is to say, the law will imply that the substitution was made upon the condition that the child or grandchild should die without leaving issue;

¹ “ 30th June 1835.—The Lord Ordinary having heard counsel for
“ the parties, and afterwards considered the closed record, productions,
“ and whole process, Finds, in respect of the implied condition *si sine*
“ *liberis*, that the provisions to Margaret Jackson did not lapse by her
“ predeceasing her father; but finds that it must be held, from the pre-
“ sumption and written evidence in process, that those provisions have
“ been already paid or satisfied; and therefore assoilzies the defender
“ from the conclusions of the action, and decerns: Finds no expenses
“ due.”

See further a passage in Burge, Com. For. & Col. Law, vol. ii. p. 109:
“ But the grounds on which this condition is implied fail, if the son
“ or grand son has a child living at the time of the institution, and
“ no mention is made of him; or, if he has two sons, and adds the con-
“ dition *si sine liberis* in making a substitution in respect of the one, but
“ omits it in making a substitution in respect of the other.” And he
refers in a note to Voct. lib. 36. tit. 1. n. 18; Gomez Var. Resol. 5.
n. 36; Cod. lib. 6. tit. 25. l. 6.

and in the event of his leaving issue, such issue will take the legacy or provision as conditional institutes, and thus evacuate or render void the substitution in favour of the third party.

It is a most reasonable and natural presumption that the testator should intend that the issue of his son or grandson should, in the event of his own predecease, succeed to the fortune destined to him, and, consequently, that any substitution to a third party should be held to be made under the implied condition of the son or grandson dying without issue. This rule, so equitable in itself, and which at first seems to have been applied solely to provisions or legacies proceeding from parents or ascendants, has in some late cases, which the respondents have referred to below, been extended to provisions or legacies proceeding from collateral relations. The rule itself has been established in the law of Scotland from time immemorial, and there is no rule of construction which is either better understood in practice or more equitable in itself.

It is true that testators very frequently express what the law would imply, and give their legacies or provisions to the heirs of their legatees. In the present case the testator, in granting the legacies or provisions in favour of his other children, substituted the heirs of their bodies in express terms; but though he had not done so, the well-established rule of the law of Scotland in regard to the construction of such instruments would, in the event of any of the children having predeceased the testator, leaving issue, have carried the legacy or provision to such issue; and even if there had been a substitution in favour of some

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third party, in the event of the predecease of the child, this substitution would be held to have been granted under the implied condition *si sine liberis decesserit*, and would have been evacuated and rendered void if the child had left issue. All this is matter of very familiar doctrine in the law of Scotland, and can be illustrated by decisions both of an early and of a recent date.¹

Whatever may be the rule in England, or in any other country, it is firmly fixed in the law of Scotland, that where a provision is given by a father or other ascendant, or even by a collateral relation, in favour of a child, it will not lapse or fall by the predecease of this child, but will devolve upon his issue. And even where there has been an express substitution to a third party, in the event of his predecease, this substitution will be held to be subject to the condition that he shall die without issue, so that his issue will take in preference to the substitute.

Judgment deferred.

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LORD CHANCELLOR.—My Lords, in this case, when your Lordships heard the argument, I entertained some doubt as to the interlocutor which is the subject matter

¹ Magistrates of Montrose v. Robertson, 21st Nov. 1738, rep. by Kilk. and Home, Mor. 6398; Walker v. Walker, 7th Dec. 1744, Elch. vo. Impl. Will, No. 5; Wood v. Aitchison, 26th June 1789, Mor. 13043; Binning v. Binning, 21st Jan. 1767, Mor. 13047; Baillie v. Neilson, 4th June 1822, Fac. Coll.; Cuthbertson v. Thomson, 1st March 1781, Mor. 4279; Wallace v. Wallace, 28th Jan. 1807, Fac. Coll.; Christie v. Paterson, 5th July 1822, Fac. Coll.; Booth v. Booth, 8th Feb. 1831, 9 S. & D. 409, & 6 W. & S. 175; Colquhoun v. Campbell, 5th June 1829, 7 S. & D. 709; Wilkie v. Jackson, 11th Feb. 1836, 14 D., B., & M., 1141.

of appeal. Upon looking, however, into the cases that were referred to, and the principle on which those cases depend, I am perfectly satisfied that the interlocutor is right.

The rule that where there is a gift to a child, and a gift over, upon the death of that child the gift over does not take effect if the child has issue, is established beyond all question, and is not matter of dispute. There seems below to have been some contest as to whether that principle applied to the case where the gift was of the surplus, and there was no gift over. Now, it appears to me, as it was stated by the Lord Ordinary below, that that is a much stronger case in favour of the principle. Where there is a gift over, the gift over does not take effect, because of the presumption of law that the intention of the settlor was that the issue of the child should take; and it would therefore be very strange if, when there was a mere gift and no gift over, the same presumption did not arise, and the issue of the child stand in the place of the parent. So far therefore as that general principle regulates this case, very little difficulty or doubt has been raised at your Lordships bar.

But it is said that in this case there are two peculiarities, which make it an exception to that rule. The one is, that the father, the settlor, was aware of the existence of the issue of the child; the other is, that in the same instrument, provision is made for the issue of some of his other children. Now with regard to the first, I do not find that that ever has been considered, per se, as constituting an exception to the rule. No doubt it is a circumstance by which,

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aided by other circumstances, the presumption of law may be rebutted, but per se it does not constitute an exception to the rule, and it would be very strange if it were so decided. In the first place it would be strange that the father of the child should not know the state of his own family: that may happen from the birth of a posthumous child, or from other circumstances which rarely can occur; but as soon as the principle is established, viz. that there is a presumption of law in favour of the issue of a child, it naturally follows that the necessity of introducing the words is to a certain degree taken away; and it would be very strange indeed, when the law under these circumstances gives the provision to the issue of the child, if the father were presumed not to have intended that which the principle of the law presumes for him. That circumstance however, per se, has never, as far as I can find in the authorities which were referred to, been considered as constituting an exception to the rule.

Then, the other exception undoubtedly is entitled to a little more consideration; which is, that in providing for his married daughter, he provides for the children of that married daughter. The Lord Ordinary makes observations upon that part of the case which are entitled to weight and consideration. He takes notice of the different position in which the daughter and the eldest son—the interests of whose children are now in question—were placed. With regard to the daughter, there is a certain sum of money given to her, and provision is made for her, and her children after her in the event of her death; with regard to the son, he makes him general heir of his real and personal estate,—a

difference of disposition which may well explain why the testator has varied the terms of the provision for the one and the other.

But independently of that, I have not found any cases in which a variation in the provision for children has, per se, been considered to rebut the presumption of law; but, on the contrary, there are several cases in which it has existed, and in which, at the same time, the presumption has been considered as arising, coupled with other circumstances, it is true; and other circumstances there are in this case. Now the two cases to which I more particularly refer are the case of *Roughhead v. Rannie*, in *Morison* 6493, and the other case which is particularly referred to by the Lord Ordinary.¹ In both those cases there were express provisions for the issue of children, and yet the Court considered that the presumption of law was raised.

My Lords, finding therefore that the principle is established, that it is clearly not in dispute but acknowledged to be part of the law of Scotland, and this case not falling within the exceptions to that rule, I have come to the clear conclusion that the interlocutor appealed from is correct; and under the circumstances, the interlocutor having been pronounced with the unanimous opinion of the Judges of the Court below, I would propose to your Lordships that it should be affirmed with costs.

LORD BROUGHAM.—My Lords, I entirely agree with my noble and learned friend, that the judgment below is right, and ought to be affirmed; and I shall state to

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¹ *Wilkie v. Jackson*, ante, p. 18.

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your Lordships the grounds upon which I have, with him, arrived at this conclusion.

It is unnecessary to examine the origin of the rule, that the condition of failure of issue is implied where provisions are made for children, and the subject-matter of these provisions is given over, whether to other children or to strangers, and that such provisions generally do not lapse by predecease of the legatee leaving issue,—or to enquire how far the Scotch law adopted the same rule, which must be admitted to have been exceedingly consistent with the general principle, that children could only be disinherited expressly, and in a certain manner and mode. It is very possible that the Scotch law may have carried the principle somewhat further than the Roman. It appears indeed, that the late decisions have extended it beyond the doctrine in former times recognized as law; and there seems a doubt whether at the time when Mr. Erskine wrote it prevailed to its full extent. The current of these decisions seems to leave no reasonable doubt that such is the rule,—that it has been extended even to collateral, though near relations, of the settlor or testator,—and that it must prevail upon the ground of a presumed intention not expressed, unless something appears sufficient to rebut the presumption. The question here is, whether any such thing exists in the present case.

The two circumstances to which my noble and learned friend has referred, and which are relied upon, are the existence of Jacob Dixon junior's children, with the knowledge of his father, when he made his settlement, and the different manner in which the provision is made for Jacob, and for the other sons and the married daughter. It does not appear that the sons were married, but the eldest daughter was married.

It is clear that the existence of children will not take the case out of the rule ; for if this had been sufficient, several of the cases could not have been decided as they have been--among others the case of Neilson v. Baillie¹, in which the eldest daughter had two children at the time of executing the trust deed. The words "and foresaids" have been relied upon as the ground of this decision, and it certainly does appear that those words were in the deed, and were taken notice of by one of the learned judges (Lord Hermand) who decided that case. But on examining the judgment it appears that only one of the five learned judges makes any reference to these words, and even he does not ground his opinion upon them, but relies, as the others do, upon the general rule of *si sine liberis, &c.*, which would not have been at all necessary had words of inheritance been in the limitation sufficient of themselves to prevent a lapse. Indeed the words in question "and foresaids" do not appear to affect the whole gift, which is of the general residue, real and personal, while these words are introduced in excepting a part of the estate from the operation of the gift during the life of the wife. In other instances it has been said the existence of a child for a length of time after the settlement, without any alteration being made in it, repelled the presumption ; but in the leading case of the Magistrates of Montrose v. Robertson¹ this circumstance had no effect, nor does it appear that this circumstance determined the case of Yule v. Yule², which was only a partial settlement affecting one fourth of the father's property.

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¹ Ante, p. 18.

² Ante, p. 12.

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The mention of the heirs of the body in the provision for the other sons and the married daughter appears to be a stronger circumstance than the existence of Jacob's children, of course known to the settlor, otherwise it could not have any effect; but it does not appear sufficient in this case to countervail the presumption which would exclude a lapse. It is needless to inquire what would have been the effect of such a diversity, had the question arisen upon a provision to the eldest son, of the same kind with the provisions to the other sons, and differing only by the omission of words of inheritance, because this is not that case. We are here upon a gift of the entire residue of the whole estate, real and personal, as my noble and learned friend has justly observed, and as the Lord Ordinary observed, after special provisions carved out of it for the younger children; and that residuary gift further distinguished from the other gifts by a direction that it shall, at all events, and at the cost, if need be, of the other provisions, be made up to a certain sum at least, which sum, as the learned Lord Ordinary has remarked, is greater than the largest amount given to any of the other children. This is not a case in which the different frame of the other limitations can exclude the application of the rule by rebutting the presumed intention of the settlor, nor does it appear that such a difference, though certainly a very strong circumstance, can be held generally and absolutely as sufficient to exclude the application of the rule, even where the provisions to which the diversity applies are exactly of the same nature.

The argument which has been maintained, both in the cases and at the bar, that the rule rests in many of the decisions upon the force of the words "children or

“ issue,” can never be extended to the rule generally ; but it seems very seldom, if ever, to have been the ground of decision. Indeed it cannot be the ground of any decision which turns upon the provision being to children, for the rule does not extend to legacies from strangers ; it is always rested upon the *pietas paterna*, and proceeds upon the presumption that the parent would not disappoint the issue of his children, if those children happened to predecease himself. But the cases are numerous which leave no doubt on this point, and particularly the case of the Magistrates of Montrose v. Robertson¹, where the bond was made payable to the four sons by name. Nay, in *Wood v. Aitchison*, 26th June 1789¹, we find the counsel who argued against the application of the rule to the case of unborn issue admitting that the law might be different as to the descendants of those to whom the gift was made *nomi-*
natim, and whom he seems to have thought clearly within the application of the rule. The Court held that in all such provisions, both the one class and the other, the issue of children predeceasing were entitled to the parent’s share ; nor is it immaterial to observe, that the counsel whose admission is referred to was Mr. Wight, and the judge, whose view of the subject was adopted by the Court, was lord Braxfield, two of the most eminent lawyers of their day.

The case just now referred to of the Magistrates of Montrose v. Robertson¹ is exceedingly strong upon the general principle, and appears to have been held as deciding the question for a long time past. We find it referred to in all the decisions, nor is the decision the

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¹ Ante, p. 18.

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less strong for having been given in a question between the party claiming the benefit of the provision, and the obligors in a bond granted by them to the father, which obligors had paid the money as was alleged, and were held by the Court in their own wrong. It is stronger on this account, and indeed it does not distinctly appear that the money in question was the sole provision made for the parties. It amounted to only about 10% among four children, all named. My noble and learned friend having referred to the case of *Roughhead*¹, it is unnecessary to observe upon the other cases which have been cited in support of this judgment, excepting that of *Wilkie v. Jackson*², which is very material, even if we were to admit that there is weight in the observations made for the appellant touching its peculiarities, and that these distinguish it in some respects from the present case; for, in the first place, it affords an additional confirmation of the doctrine already stated, that the implied condition *si sine liberis, &c.* is not at all confined to limitations to children or issue, as *nomen collectivum*, of the daughters Margaret and Jane, being expressly named, and the claim being made by the grandson of Margaret as representing her eldest son against James the grandson of the settlor as representing his uncles, sons of the settlor, so that the claimant did not come in under any limitation to children or issue; and, secondly, all the provisions made to Margaret, the settlor's eldest daughter, were held to descend upon her son, and through him upon her grandson, as well those which had been made to her without mention of heirs and assigns, as those which

¹ Ante, p. 13.

² Ante, p. 18.

had been made to her with mention of assigns. This, therefore, meets the principal objection to the application of the rule in the present case.

Nor is it any answer to urge that the general clause making the provisions for the younger children burdens upon the land has the words "and theirs aforesaid," because, admitting this to mean their "heirs aforesaid," it would only affect those preceding limitations in which heirs had been mentioned, were it not for the implied condition *si sine liberis, &c.*, and would of itself only make those preceding provisions which were limited by such words burdens on the land, and not the other provisions, and yet J. Wilkie recovered for the whole, as well for those that had not the words of inheritance as for those that had. The ground of the decision is that by force of the implied condition *si sine liberis* the provisions to Margaret did not lapse by her predecease. And this, be it observed, is the decision of the same very learned judge (Lord Corehouse), who has been cited as holding in another case (*Greig v. Malcolm*¹) that the difference of omitting the mention of heirs in one limitation and inserting it in another is, as it were, conclusive proof of a different intention, and excludes the application of the rule. The case of *Greig v. Malcolm*¹, when examined, does not at all bear out this inference as to the scope of Lord Corehouse's observation, but were that left in any doubt his lordship's decision in *Wilkie v. Jackson* would remove it.

I therefore agree entirely with my noble and learned friend that the decision of the Court below has proceeded upon right grounds; and for the reasons which

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¹ Ante, p. 12.

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Judgment.

I have stated, and those which have been stated by my noble and learned friend, I agree with him that the decision ought to be affirmed with costs.

The House of Lords ordered and adjudged, That the said petition and appeal be and is hereby dismissed this House, and that the interlocutors, so far as therein complained of, be and the same are hereby affirmed: And it is further ordered, That the appellants do pay or cause to be paid to the said respondents the costs incurred in respect of the said appeal, the amount thereof to be certified by the clerk assistant: And it is further ordered, That unless the costs, certified as aforesaid, shall be paid to the party entitled to the same within one calendar month from the date of the certificate thereof, the cause shall be remitted back to the Court of Session in Scotland, or to the Lord Ordinary officiating on the bills during the vacation, to issue such summary process or diligence for the recovery of such costs as shall be lawful and necessary.

ARCHIBALD GRAHAME — RICHARDSON and CONNELL,
Solicitors.