KIPPEN ET AL., ... APPELLANTS.
DARLEY ET AL., ... RESPONDENTS.

1858.
April 27th, 29th, 30th, May 3rd, 10th, 21st.

Double Portions—Satisfaction.—Case in which (affirming the decision of the majority of the Court of Session) it was held by the House (Lord Cranworth dissenting), that the presumption established in England against double portions does not exist as a canon of construction in the law of Scotland.

Per the Lord Chancellor: In the law of Scotland it does not appear that any general antecedent presumption exists against double portions; p. 232.

Per the Lord Chancellor: If a father gives his child the same amount of money by two different instruments, unless it appear either expressly or by necessary implication that he really *intended* the one sum to be in satisfaction of the other, the law of Scotland will not *presume* that he *meant* the one to be in satisfaction of the other; p. 238.

Semble, however, that where the prior provision was obligatory, as by bond constituting an actual debt in favour of the child, a subsequent provision will by the law of Scotland be deemed, not a bounty, but a satisfaction of the debt, upon the principle *debitor non præsumitur donare;* p. 232.

Per Lord Wensleydale: I conceive that by the law of Scotland there is no *primâ facie* presumption against double portions; p. 258.

Per Lord Wensleydale: I am not satisfied that there is any rule of the law of Scotland, that a settlement on a daughter by a marriage contract is presumed to be a satisfaction of a previous provision, unless that provision be *ex obligatione;* p. 259.

Per Lord Cranworth: The law of Scotland presumes against duplication, and, in doing so, corresponds with the law of England; p. 242.

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Per Lord Cranworth: If a parent having left by his will 10,000*l.* to his daughter, on her marrying afterwards settles 10,000*l.* upon her, it would, in ninety-nine cases out of a hundred, defeat his intention, if she were allowed to take the two sums; p. 246.

Costs.—How far, when a judgment is affirmed, the question being one of admitted difficulty, costs are to be disallowed as against the Appellant; p. 264.

THE proceedings originated in a summons of multiple-poinding (interpleader), brought by George Marshall Darley, James Hill Kippen, William Kippen, and John James Alston, as trustees under the trust disposition and settlement herein-after more particularly mentioned.

From the pleadings it appeared that by antenuptial contract of marriage, dated 2nd August 1815, between William Kippen of Busby, deceased, and Marianne Alston, he, the said William Kippen, undertook to provide and pay to the children of the intended marriage, the following sums; namely, "if one child, 2,000*l.*; if two, "4,000*l.*; if three, 6,000*l.*; if four, 8,000*l.*; but which "sums if there should be more than one child, he "reserved power to divide; and, failing division, it "was declared that the division should be equal."

These provisions were to be in full of "all legitim, "bairn's part of gear, or any other claim which they "might by law be entitled to."

The contemplated marriage took place, and of it there were ten children. Five were daughters.

On the 17th June 1848, by antenuptial contract of marriage between Marianne (one of the daughters), and John James Alston, the said William Kippen became bound to pay to certain trustees 5,000*l.*; viz., 1,000*l.* at Martinmas then next, and 4,000*l.* at the end of twelve months after his death; and these provisions were by the deed agreed to be accepted by the said

Marianne, and her said intended husband in full of all she was entitled to under her father and mother's marriage contract of the 28th August 1815 aforesaid, "and of every other provision legal or conventional "competent against the said William Kippen, or his "means and estate, or his heirs and successors after "his death."

On the 5th of May 1849, by antenuptial contract of marriage between Christina (another of the daughters) and William Shaw, the said William Kippen became bound to pay to certain trustees provisions of the same amount, and payable in the same manner, as in the marriage contract of Marianne aforesaid, with the like clauses declaring acceptance of these provisions in lieu and satisfaction of the other like claims as mentioned in the contract of Marianne, the 17th June 1848.

On the 17th July 1849 the said William Kippen executed a trust disposition and settlement (*a*), whereby he conveyed his whole heritable and moveable estate to trustees for the following purposes:—

1st. To pay debts and expenses; 2nd. To convey his lands of Busby to his youngest son at majority, under burden of a jointure to the truster's widow of 400*l.* per annum, and of certain other annuities; 3rd. To convey his lands of East Kilbride to his son William, and to pay him 2,000*l.*, under deduction of previous advances (*b*); 4th. To set apart 4,000*l.* for each of his daughters Margaret, Jane, and Elizabeth, "and for the lawful issue of such of them as may "have died, leaving such issue, as coming in place "and as in right of their deceased parent; and to

(*a*) This instrument, being of a testamentary nature, was often by the Law Lords called a *will*. See their opinions, *infrà*.

(*b*) See *infrà*, p. 224.

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" invest and secure the said sum for behoof of each of " my said daughters in liferent, for her liferent use " allenarly, during all the days and years of her " natural life, exclusive of the *jus mariti* or right of " administration of any husband whom she may have " married or may marry, and of her lawful issue, " share and share alike, in fee and property," and to bear interest after the lapse of twelve months from his death, or from the date of investment, if sooner invested; " declaring, that in case any of my daughters " surviving me shall happen to die without leaving " lawful issue, it shall be in her power, by any deed " or other writing under her hand, to legate and " bequeath the said sum of 4,000*l.* sterling hereby " provided to her in liferent, to any person or persons " she may judge proper; and failing thereof, the same " shall revert to and form part of the residue of my " estate. And in respect that I have already provided " for my daughters, Marianne, wife of John James " Alston, and for Christina, wife of William Shaw, by " the marriage contracts between them and their said " husbands, I declare that the provisions therein made " in favour of my said two daughters are in full of all " they could claim, or are entitled to receive from my " estate;" 5th. To pay to his son George 6,000*l.* under deduction of advances; 6th. To assign to his wife, if she survived him, his furniture and farm stock at Westerton, and to assign to his son William his furniture at Lawmoor; and lastly, to make over the residue of his personal and heritable estates to his sons James and Richard equally, and their heirs; " and " which provisions above written, conceived in favour " of my said children, shall be accepted of by them, " and the same are hereby declared to be, in full of all " legitim, portion natural, bairns' part of gear, exe- " cutory, or others whatsoever, which they, or any of

" them, can ask or demand by and through my " decease, or any other manner of way."

On the 14th December 1850, by antenuptial contract of marriage between the Margaret aforesaid and Hugh Fleming Edmiston, the aforesaid William Kippen bound himself to pay to certain trustees 5,000*l.* as a tocher for the said Margaret, payable, 1,000*l.* thereof at Whitsunday 1851, and the remaining 4,000*l.* at the first Whitsunday or Martinmas twelve months after his death, the interest, after these periods of payment, to be held "in trust for the said Margaret Kippen in " liferent, for her liferent alimentary use allenarly, " exclusive of the *jus mariti* or right of administra- " tion of the said Hugh Fleming Edmiston, or any " future husband;" and to "hold the said principal " sum of 5,000*l.* in trust for the children of the mar- " riage equally among them, if more than one, share " and share alike;" declaring that if there should be no issue of the marriage at its dissolution by Margaret Kippen's death, or if such issue should all die before majority without lawful issue, " then, and in either " of these events, the said tocher of 5,000*l.* should " revert to the said William Kippen, and his heirs " and assignees whomsoever," and be payable, if he should predecease his daughter Margaret, to the sons of his son William and their issue.

This contract of the 14th December 1850 did not say whether the tocher of 5,000*l.* was, or was not, to be in satisfaction of previous provisions.

Subsequently to this last contract William Kippen added two codicils to his trust disposition and settlement; the one codicil dated 6th January 1852, restoring the 4,000*l.* to each of Jane and Elizabeth, in place of the respective annuities of 120*l.*, and reducing the provisions to William and George in

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respect of advances; the other codicil, dated 7th January 1853, again substituting an annuity of 120*l.* to each of Jane and Elizabeth in lieu of the respective sums of 4,000*l.* Each of the codicils stated that, with these alterations, the testator or settlor confirmed his deed of settlement in all other respects.

Having bound himself by being a party to these three contracts, and having executed the trust disposition and settlement with codicils thereto, all as aforesaid, William Kippen departed this life in January 1853.

In the multiple-poinding, Mr. and Mrs. Edmiston made the following claims: In the first place, they claimed 800*l.* as the tenth share of the 8,000*l.* secured by the antenuptial contract of 2nd August 1815; secondly, they claimed 4,000*l.* as the provision secured to Mrs. Edmiston and her family by the trust disposition and settlement of 17th July 1849; and thirdly, they claimed 4,000*l.* as balance due, at Whitsunday 1854, of the 5,000*l.* secured by the antenuptial contract of the 14th December 1850.

These claims were resisted by the residuary legatees, who maintained that the provisions secured to Mr. and Mrs. Edmiston by the contract of the 14th December 1850, satisfied not only the 800*l.* under the contract of 2nd August 1815, but also the 4,000*l.* under the trust disposition and settlement of the 17th July 1849.

The Lord Ordinary *Deas*, on the 22nd November 1854, pronounced an Interlocutor, finding that the provision made by William Kippen for his daughter Margaret and the issue of her marriage by the contract of the 14th December 1850 was in implement and satisfaction of the provisions made for her and her issue by the contract of 2nd August 1815, and

by the trust disposition and settlement of 17th July 1849.

His Lordship explained his Interlocutor in the following reasoned note:—

I. As to the 800*l.* The Lord Ordinary is of opinion that this sum must be held to be satisfied by the much larger provisions conferred by Mr. Kippen on Mrs. Edmiston and her family by her contract of marriage.

The 1,000*l.* agreed to be paid by Mr. Kippen in his lifetime to Mrs. Edmiston's marriage contract trustees was of itself more than sufficient to extinguish the 800*l.* payable after Mr. Kippen's death under his own marriage contract, supposing him to leave no need of division. Mr. Kippen had power to settle this 800*l.* upon his daughter and her issue in liferent and fee, and consequently to create a trust, without which it could not have been so settled. He had also power, with the assent of her and her husband (implied in their becoming parties to the contract), to declare the liferent to be alimentary, and exclusive of the *jus mariti* and administration of the husband, even if his power to impose these conditions for his daughter's benefit would not have been implied in his reserved power of apportionment itself. Nor can Mrs. Edmiston's issue by any subsequent marriage be said to be unduly prejudiced, for Mr. Kippen might have given her the full fee of the 800*l.*, and consequently he might with, if not without, her consent dispose of the fee in the way he did by her contract of marriage. The maxim *debitor non præsumitur donare* is directly applicable to this branch of the case, as well as various authorities too familiar to require to be here cited.

II. The question how far the gratuitous provision contained in Mr. Kippen's trust settlement is to be held satisfied or superseded by Mrs. Edmiston's marriage contract provision is a question of some delicacy, if not of difficulty.

The cases of *Grant*, 19th November 1840, and *Nimmo*, 29th June 1841, although they have an important bearing upon this case, can neither of them be said to be directly in point, nor indeed can any case of this kind be expected to be precisely like another. Mr. Kippen's relative position and course of dealing with reference to his family, and the fair construction of his deeds, afford the chief elements for decision.

The first of Mr. Kippen's five daughters was married in June 1848, and the second in May 1849. In each of their marriage contracts he became bound to pay to trustees 1,000*l.* at the next term of Martinmas after the date of the contract, and 4,000*l.* at the end of twelve months after his death, the whole 5,000*l.* to be invested on heritable security, and the interest to form an alimentary provision for the daughter, free from her husband's debts and deeds, and the

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fee to go to the children equally, failing any different apportionment by the parents. These provisions were declared to be in full of all claims under Mr. Kippen's own contract of marriage, and of every other provision, legal or conventional.

By the trust settlement, which followed in about two months after the second contract, Mr. Kippen directed his trustees to invest and secure for behoof of each of his unmarried daughters, Margaret (afterwards Mrs. Edmiston), Jane, and Elizabeth, 4,000*l.*, of which each was to have the liferent allenarly (*a*), exclusive of the *jus mariti* and administration of any husband she might marry, and the fee to go to her issue, share and share alike, just (in substance) as had been done with reference to the 4,000*l.* (as well as the 1,000*l.*) provided to each of his married daughters in their marriage contracts. He then assigns *the reason* why the married daughters were to have no more, by saying it was '*in respect*' he had already provided for them by their contracts of marriage, while, as regarded the unmarried daughters (to neither of whom he had as yet provided the additional 1,000*l.*), he simply declared that their provisions were to be in full of all *legal* claims.

Thus far, undoubtedly, there is good evidence of Mr. Kippen's intention that there should be substantial equality among his daughters, and more particularly that the daughters then unmarried should not have more than the daughters who had been married.

Did Mr. Kippen, then so entirely change his mind when he became a party to Mrs. Edmiston's marriage contract as to resolve to give her and her family nearly double what he had given to her married sisters and their families? The Lord Ordinary cannot think so.

By Mrs. Edmiston's marriage contract Mr. Kippen provided to her and her family precisely the same sums, and limited and destined them substantially in the same way, as he had done in the marriage contracts of her two sisters, that is to say, he became bound to pay to trustees 1,000*l.* at the next term after the date of the contract, and 4,000*l.* at or about the lapse of twelve months after his death, all in name of tocher, and to be invested for the alimentary liferent allenarly of the daughter, exclusive of the *jus mariti* and administration of the husband, and for the children of the marriage, equally, in fee. He thus dealt with Mrs. Edmiston and her husband upon their marriage just as he had dealt with Mrs. Alston and Mrs. Shaw, and their husbands, upon their respective marriages.

No reason, indeed, is surmised why he should have done differently. Mrs. Shaw had been married within less than a year after Mrs. Alston, and Mrs. Edmiston was married in about eighteen months after Mrs. Shaw, while two of his daughters remained unmarried, and his wife was still alive, so that there was no

(*a*) Only.

prolonged residence with and attention to him on the part of Mrs. Edmiston after the other daughters had left him, or any other probable cause to have induced such a large preference as is now alleged in favour of Mrs. Edmiston, which he certainly did not intend to give her when he made his settlement about sixteen months before.

Not only, however, are the provisions in Mrs. Edmiston's marriage contract similar in amount and conditions with the provisions in the marriage contracts of Mrs. Alston and Mrs. Shaw, but there is substantial identity, both in amount and conditions, between the 4,000*l.* in Mrs. Edmiston's marriage contract and the 4,000*l.* provided to her and her family by the trust settlement.

In both cases the 4,000*l.* is to be invested and secured for Mrs. Edmiston in liferent, exclusive of the *jus mariti* and administration of her husband, and for her issue, share and share alike, in fee. The slight variation in the term of payment and in the mode of investment (which by the contract is restricted to heritable property) introduced, obviously from motives of convenience and expediency, are altogether immaterial. The only variations deserving of notice are, 1st, that, failing issue, Mrs. Edmiston by the settlement had a power to test on the 4,000*l.* which is not conferred by the contract; and, 2nd, that the fee was provided to her issue generally by the settlement, whereas by the contract it is provided to her issue of that particular marriage.

The first of these variations, however, except in so far as it connects with the second, does not seem to go deep into the question whether Mr. Kippen intended the marriage contract provisions to supersede the provisions in the settlement, while the second occurred in the case of *Grant*, and there seems no sufficient reason for giving it greater weight here than was given to it there.

The circumstance that, after the date of the marriage contract, two codicils were executed, altering the settlement in some respects and confirming it in all others, also occurred in the case of *Grant*. Indeed, upon the assumption that Mrs. Edmiston's 4,000*l.* provision under the settlement had been satisfied or superseded by the provisions in the marriage contract, this confirmation was quite right. Nor can the fact that Mr. Kippen afterwards, before his death, saw cause to limit his two daughters who remained unmarried to an annuity, materially affect the fact that, when he became a party to Mr. and Mrs. Edmiston's marriage contract, his object was to place all his married daughters upon a footing of equality. As to his sons, they were obviously provided for on a different scale from the daughters, so that no safe analogy can be drawn from their provisions, whether residuary or otherwise.

The strength of Mr. and Mrs. Edmiston's case, therefore, really comes to rest upon the peculiarity that in each of the marriage

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contracts of Mrs. Alston and Mrs. Shaw there is inserted an express clause declaring the provisions to be in full of all claims, legal and conventional, whereas in Mrs. Edmiston's marriage contract there is no such clause.

But here the observation occurs, and to the effect of accounting for this difference it is thought to be a perfectly legitimate observation, that this last marriage contract was prepared by a different man of business from the two previous contracts, which he probably never saw, and if he knew, as it must be presumed he did, that such a clause was in the circumstances unnecessary, the fact, of which he was ignorant, that another man of business had inserted such a clause in these other contracts, could of course afford neither reason nor inducement for him to do the same.

The writer of the previous contracts appears to have inserted the clause merely *ob majorem cautelam*, for he made it applicable not only to *conventional*, but to *legal* claims, although these last were already excluded by the terms of Mr. Kippen's own marriage contract, to which the clause makes express reference. The Lord Ordinary thinks that the one branch of the clause would, in the circumstances, have been as superfluous in Mrs. Edmiston's marriage contract as the other, although it might have been prudent enough to have inserted it to avoid questions such as have now been raised. The presumption that a father, in giving a tocher to his daughter in her marriage contract, brings into view all he means to give her, in order to obtain the best possible terms from the contracting husband, may be a mere *primâ facie* presumption, to be taken simply as evidence of intention along with the whole other circumstances; but still it is an important presumption, which must occur, with less or more weight, under the marriage contract of every daughter to whom the father thereby provides a tocher; and giving it its due weight there, along with the other circumstances, the Lord Ordinary really cannot doubt that it would be doing violence to, and not fulfilling, Mr. Kippen's intentions, if Mrs. Edmiston and her family were to receive 9,000*l.* (or, in another view, 9,800*l.*), while each of her married sisters and their families receive only 5,000*l.*

The First Division of the Court of Session, in reviewing the *Lord Ordinary's* Interlocutor, came to be equally divided in opinion. Therefore a "hearing in "presence"(*a*) before the Judges of both Divisions took place, and on the 3rd July 1856 the following decision was pronounced:—"The Lords having heard the "Counsel for the parties, and considered the opinions

(*a*) See 18 Second Series of Scotch Rep. 1137.

" of the consulted Judges, recall the Interlocutor of " the *Lord Ordinary* complained of: Find that the " provisions made by the late Mr. Kippen for his " daughter Mrs. Edmiston, in her contract of mar- " riage, and the issue of her marriage with Mr. " Edmiston, were in implement and satisfaction of " the provisions made for children in the marriage " contract between her father and mother in so far as " she was interested therein, but were not in imple- " ment and satisfaction of the provisions made in " favour of her and her children by the trust dis- " position and settlement of Mr. Kippen: Find that " said last-mentioned provision is still subsisting, and " must be implemented, and therefore sustain the " claim for Mr. and Mrs. Edmiston and her son to " that extent."

On the occasion of this decision, the following opinion was delivered by the *Lord President.* His Lordship was in the majority :—

The *Lord President.*—We are not pressed to decide on the claim under the marriage contract of 2nd August 1815. We must gather whether Mr. Kippen intended to give and has given to Mrs. Edmiston the provision in the trust settlement in addition to that contained in the contract of marriage, or whether the last was in satisfaction of the provision in the trust settlement. There are material differences between the disposal of the sums given in the contracts of marriage of Mrs. Alston and Mrs. Shaw, and those in the contract of Mrs. Edmiston. In particular, in the latter there is no discharge and renunciation of former bequests as is contained in the other two contracts; and there is this further difference, that if there should be no issue of that marriage, then the provision was to revert to Kippen's own residue of the estate; whereas, in the contracts of the other daughters, there was a discharge and renunciation of the other provisions, and there was not that limitation of interest in the sum given under the marriage contract. The provision in their contracts of marriage is not limited to the interest of the issue of that marriage, but is to benefit the issue of any subsequent marriage; and there is a power of testing and disposing of the sum. Mrs. Edmiston, therefore, was at no time upon the same footing with these other two daughters. In point of fact, there is also a difference between the provisions in the trust settlement

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and the provisions in the contract of marriage, for the provision in the settlement goes to the issue of any marriage, and there is also given the power of disposal of it. Now, these are material differences.

Now, as to intention. The first thing that strikes me is, that in the case of Mrs. Edmiston I find what does not occur in the case of the other daughters, viz., that there are two deeds existing in her favour. The question is, how we are to read these two deeds, which contain each of them provisions in her favour, but different in character and value, and not declared to be the one in place of the other? Then, again, there is this circumstance, which I think of importance in a question of intention, that while we have the contracts of marriage of several of his daughters before us, and while in the case of Mrs. Edmiston's marriage the provision is less favourable for her than the marriage provisions of the other married daughters, there is a marked omission in her marriage contract of the discharge of prior bequests, which is inserted in the others. On the other hand, while that provision is less favourable to the wife, it is more favourable to the issue of that marriage; and probably it is more favourable to them, because the husband dealt more liberally with the issue of that marriage than in the other cases. Still the daughter's children, by any other marriage, might be unprovided for, and there was nothing in her power to leave to them. All these circumstances rather point to the conclusion that these inequalities in Mrs. Edmiston's position indicate some purpose or intention relative to her which requires to be satisfied in some other way. This indication is answered by this trust deed and settlement in her favour, the continued subsistence of which, I think, is fairly accounted for by the peculiarity of her position in other respects.

But further, there is the circumstance that Mr. Kippen made an annual revision of his settlement, and in making it he had always before him the clauses in favour of Mrs. Edmiston; yet, while he was altering the position of the other daughters, to whom as well as to Mrs. Edmiston the clause applied, he did not make any alteration in the position of Mrs. Edmiston in reference to her interests under that trust deed. The matter was pre-eminently brought under his notice that he had omitted to do so in the marriage contract, and it is likely that while he was making alterations for the other daughters, he would have made it for her too. These circumstances indicate intention on his part to deal differently with her from any of the others.

It is said that the presumption is against a double provision. There is, in certain cases, such a presumption, and that presumption is more or less strong, according to circumstances. I do not know that it is peculiarly strong when the one provision is in a will and the other in a marriage contract. But it is said that the presumption is that a father brings forward everything at the marriage of

his daughter, in order to secure the best terms he can from the future husband. I do not know that this rule is not too broadly stated. It only means that there is a presumption that he brings forward everything that he has in contemplation of doing for her—all that he intends to bind himself to do, but not all that he may do. But if the object be to get the best terms he can for his daughter, that was plainly not a strongly operative motive here, for by doing less for Mrs. Edmiston he got more for her than for the other daughters.

Then allusion is made to the inequality that would be introduced among the daughters by sustaining the double provision in favour of Mrs. Edmiston. I am not moved by that consideration. It struck me at first, but I attach no importance to it now. It is difficult to figure a case in which there is more plainly an intention of operating inequality than in this case, apart from this double provision. In one reading of this settlement there are three grades among five children. There are two married daughters, two unmarried daughters, and Mrs. Edmiston. They are all on a different footing, and I do not see any greater reason for making two daughters better than Mrs. Edmiston, than for making her better than two daughters. There is no stronger reason for putting her in the middle of that gradation than for putting the two daughters there. It is impossible, in any way, to get a rule of equity in this case, and therefore motives of equity are excluded by the very nature of the case. It is very difficult to find rules by which we are to construe the intention of parties towards their family, and therefore, although we have no reason for inequality here given, we have the fact and the intention of inequality plainly given. Therefore, I think that none of these considerations can give us the clue to the intention of Mr. Kippen to exclude the provisions which he had made in favour of Mrs. Edmiston under the trust deed and settlement.

The Lord Ordinary, in his note, I think, has overlooked some considerations. He says Mr. Kippen "became bound to pay to trustees 1,000*l.* at the next term after the date of the contract, and 4,000*l.* at or about the lapse of twelve months after his death, all in name of tocher, and to be invested for the alimentary liferent allenarly of the daughter, exclusive of the *jus mariti* and administration of the husband, and for the children of the marriage, equally in fee. He thus dealt with Mrs. Edmiston and her husband upon their marriage, just as he had dealt with Mrs. Alston and Mrs. Shaw and their husbands, upon their respective marriages."

Now, this is a mistake. He did not deal with Mrs. Edmiston in the same way as Mrs. Alston and Mrs. Shaw. The provision is quite different. It is a provision in favour of the issue of that marriage alone, and which reverted to his own residue, in the event of there being no issue of the marriage.

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The same is again repeated by the Lord Ordinary. "Not only are the provisions in Mrs. Edmiston's marriage contract similar in amount and conditions with the provisions in the marriage contracts of Mrs. Alston and Mrs. Shaw, but there is substantial identity, both in amount and conditions, between the 4,000*l.* in Mrs. Edmiston's marriage contract, and the 4,000*l.* provided to her and her family by the trust settlement."

Now, that also, I apprehend, is a mistake—because the 4,000*l.* provided by the trust settlement is in a totally different condition from that provided by the marriage contract. Suppose that Mr. Edmiston were to die, and Mrs. Edmiston were to marry, and have another family—in that case, and if that family were claiming that 4,000*l.* under the settlement, the fee being given to them by the deed, it would have been very difficult to have resisted their claim. That could not have happened in regard to any of the other daughters.

The Lord Ordinary says,—"That the only variations deserving of notice are, 1st, That failing issue, Mrs. Edmiston, by the settlement, had a power to test on the 4,000*l.*, which is not conferred by the contract; and, 2nd, That the fee was provided to her issue generally by the settlement, whereas, by the contract, it is provided to her issue of that particular marriage." Now, these are important alterations. I differ from the Lord Ordinary in holding that they are substantially the same. The interests are different; and the interest is given in the one case to a class of heirs not given in the other. It is a right and destination to parties in the one case who are excluded in the other case.

The cases that have been referred to were, first, *Grant*, 19th November 1840, which underwent a great deal of discussion, and which came nearest to this of any or those referred to. But, in the first place, there was in that case a declaration that the sum was in full of the patrimony; and, in the second place, the contract did not stand out in contrast with the contracts of marriage of other daughters. Then, in the case of *Nimmo*, the contract was prior to the settlement, and seems to have been decided on the principle of *debitor non præsumitur donare.*

The remark was made, that the omission or introduction of the clause containing a discharge and renunciation of previous bequests was to be attributable to the fact of two different agents using different styles in preparing the deeds. It would be dangerous to introduce that as a rule of decision; for why are we to hold that to be the act of the agent, more than the act of limiting the fee to the children of that particular marriage? Where can we stop? But I can see a reason for it in the whole history of these deeds; and I am not disposed to regard it as an unimportant consideration.

The only other remark which I have to make is in reference to the English cases. I am always apprehensive when I deal with

such cases that I may be dealing with matters which I am not master of. But in reading those cases to which we have been referred, and more particularly the case of *Durham*—in which the other cases have been referred to, and cited by Lord Brougham, and also cited by Lord Lyndhurst, who differed from Lord Brougham—this much I think I can discover, that in England there are certain rules by which the intention of parties is construed, which rules have no place with us; and it is very plain that, in every country where courts of law are compelled to construe deeds of settlement of this kind, in which parties have not clearly expressed their intention, they must adopt general rules which may aid them in doing so. But these rules are founded, not on any abstract principle of law, but on the presumption of intention of parties; and then, again, that presumption must be deduced from the habits of the country—from the prejudice of the party in making the provision—from the style of the deeds, and the different states of society which may exist in one place and not in another,—so that it is very difficult to draw from the rules of any country, aid in construing deeds made in another country, for the feelings, the habits, and the language in which the intention is expressed are different, and the rules adopted in one country may therefore be totally inapplicable in another. And further, seeing that some of the English Judges have been complaining of the length to which these rules have driven them in compelling them to conclusions which they do not think in accordance with the intention of parties, we therefore must have great hesitation in adopting any of them. In the case of *Durham*, Lord Brougham held that the rule in favour of ademption is not absolute, but may be overcome by the circumstances of the case; and his decision went on this ground, that the provisions were in extinction of two previous sums; but it was not said to be in extinction of another, and therefore he held that the party had different intentions regarding them. But again, Lord Lyndhurst says that the argument does not move him in the least, and the reason he gives is, that it was necessary, as far as related to debt, that the provision in satisfaction of it should be in terms expressed; but as far as related to a provision by will, it was not necessary, because that effect was produced by the operation of law. Now, that principle cannot be applied to our law, for the very opposite is ours; and yet this is the principle on which the case of *Durham* was decided. Nor am I satisfied that I know exactly what is the meaning of the word *ademption*. But I see that in England there are rules which have no place with us, and which may materially influence the English decision. Therefore, in this case, where there are such great differences between the condition of the sums given, and where the position of Mrs. Edmiston was so different from that of the other daughters, in whatever view one can take it—where the party was so frequently revising the deeds, and had this matter so frequently

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brought under his notice,—when I look to all these considerations, I have come to the conclusion that Mr. Kippen did not mean the provision in the marriage contract to come in place of the provisions in the settlement, which he meant to the last to keep up and belong to Mrs. Edmiston; and therefore, I am inclined to concur in the opinion of the majority.

The Appeal to the House was against the Judgment of the full Court.

The Appellants were the residuary legatees of William Kippen; while, on the other hand, Mr. and Mrs. Edmiston and their son, and the trustees of the trust disposition and settlement, were the Respondents.

Mr. *Rolt* and Mr. *Anderson* were heard for the Appellants.

The *Lord Advocate* (*a*) and Sir *Richard Bethell* for the Respondents.

The arguments used, and the authorities cited, are fully examined and discussed in the following opinions.

Lord Chancellor's opinion.

The LORD CHANCELLOR (*b*):

My Lords, in this case the proceedings originated in a summons of multiple-poinding brought at the instance of the Appellants, the acting trustees of William Kippen, to have it found and decreed that under a certain trust disposition and certain marriage settlements they were only bound to pay to Mrs. Margaret Edmiston, the daughter of William Kippen, the sum expressed and contained in her marriage contract, which was to be taken by her in satisfaction of all rights and claims which she could demand or become entitled to through the decease of her father, either by settlement or in any other manner.

The *Lord Ordinary*, before whom the case was first brought, found "that according to the true construc-

(*a*) Mr. Inglis.
(*b*) Lord Chelmsford. His Lordship's opinion was in writing.

tion of the marriage contract between the claimants, Mr. and Mrs. Edmiston, to which the late Mr. William Kippen was a party, the provisions thereby made by Mr. Kippen for his daughter, Mrs. Edmiston, and the issue of the marriage, were in implement and satisfaction of the provisions previously made for her and her issue in the marriage contract between her father and mother, and in her said father's trust deed and settlement."

Against this interlocutor a reclaiming note was presented to the First Division of the Court of Session by the Respondents, Mr. and Mrs. Edmiston and their son. The Judges of the First Division Court being equally divided, the case was sent for hearing to the whole Court, on the question whether the Interlocutor reclaimed against should be adhered to. The case having been heard by the whole Court, a majority, consisting of six of the Judges, were of opinion that the provisions in the settlement were payable to Mrs. Edmiston and her children in addition to those contained in her marriage contract, while a minority of three Judges were of a contrary opinion, and in favour of affirming the *Lord Ordinary's* Interlocutor.

The case having again been brought before the Inner House, two Judges adopted the views of the majority of the consulted Judges, and two those of the minority, so that in the result your Lordships will find that eight of the learned Judges were of opinion that Mrs. Edmiston was entitled to the benefit both of her own marriage contract and of her father's trust disposition or settlement, and five of the same learned body were of an opposite opinion, and the following Interlocutor was pronounced:—"The Lords having heard the Counsel for the parties, and considered the opinions of the consulted Judges in conformity there-

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with, recall the Interlocutor of the *Lord Ordinary* complained of: Find that the provisions made by the late Mr. Kippen for his daughter, Mrs. Edmiston, in her contract of marriage and the issue of her marriage with Mr. Edmiston, were in implement and satisfaction of the provisions made for children in the marriage contract between her father and mother, in so far as she was interested therein, but were not in implement and satisfaction of the provision made in favour of her and her children by the trust-disposition and settlement of Mr. Kippen: Find that said last-mentioned provision is still subsisting and must be implemented; and therefore sustain the claim for Mr. and Mrs. Edmiston and her son to that extent, and repel the same *quoad ultra.*"

Against this Interlocutor appeal is now made to your Lordships. In order to determine the question involved in this Appeal, which, from the great difference of opinion existing upon it, your Lordships will consider to be one of some difficulty, it will be necessary to examine very carefully the different settlements and other instruments upon which the solution of it depends.

By the marriage contract of William Kippen and Marianne Alston, and to which the father of Marianne was a party, which is dated the 2nd August 1815, certain provisions were made for the children of the marriage, to which alone it is important to draw attention. By that marriage contract William Kippen binds and obliges himself to provide and pay to the children of the marriage the following sums at the first term of Whitsunday or Martinmas after his decease, with the lawful interest thereof from the time it becomes due until it is paid, viz.:—If one child, 2,000*l.*; if two, 4,000*l.*; if three, 6,000*l.*; if four, 8,000*l.*; but which said sums, if there be more children than

one, the said William Kippen shall be entitled to divide among them and their issue in such shares and proportions, and in liferent or fee, as he shall think proper by any deed under his hand; which failing, the same shall be divided equally among them; the issue of such of them as may be dead succeeding to their father or mother's share.

And then the marriage contract contains this clause:—"And the foresaid provisions stipulated in favour of the said children shall be in full to them of all legitim, bairns' part of gear, or any other claim which they might by law be entitled to at the decease of the said William Kippen, or at the dissolution of the marriage, all of which is hereby discharged, save and except what further provisions the said William Kippen may of his own free will make in their favour, and save and except, in the event of his dying intestate, their claims to a share of his estate and effects; and the said Marianne Alston and William Kippen hereby accept of the foresaid stipulations by the said John Alston, in favour of the said William Kippen, in full of any share or provision which the said Marianne Alston is entitled to by the contract of marriage betwixt the said John Alston and Mary Dennistoun."

There were ten children of this marriage, five sons and five daughters, the daughters being Marianne, Christina, Margaret, Jane Dennistoun, and Elizabeth.

Marianne married John James Alston, and Christina married the Rev. William Shaw; and upon the occasion of their respective marriages, marriage contracts were prepared by one of their brothers, George Kippen; the contract on the marriage of Mr. and Mrs. Alston being dated the 17th June 1848, and that upon the marriage of Mr. and Mrs. Shaw on the 5th

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and 12th May 1849. I mention these marriage contracts together because they will be found to be nearly exact counterparts of each other; and when I direct attention to any of the provisions contained in the one, your Lordships will understand that corresponding provisions are to be found in the other. To both these marriage contracts of his daughters, William Kippen is a party. Mr. Alston, by his contract, obliges himself, in the event of his being survived by his wife, to pay her an annuity of 100*l.* (the annuity which Mr. Shaw provides for his wife is 30*l.*, and in implement of his obligation he undertakes to secure her an annuity of 30*l.* from the Widows' Fund of the Church and Universities of Scotland).

The provision for the children of the marriage is in these terms:—"The said John James Alston binds and obliges himself to provide and pay to the children of the marriage the following sums of money at the first term of Whitsunday or Martinmas after his decease, with the legal interest thereon from the time it falls due till actually paid, viz.:—If one child, the sum of 1,000*l.*; if two, the sum of 1,500*l.*; if three, the sum of 2,000*l.*; if four or more, the sum of 2,500*l.*; but which said sums, if there be more children than one, the said John James Alston shall be entitled to divide among them and their issue in such sums and proportions, and in liferent or fee, as he shall think proper, by any deed under his hand; which failing, the same shall be divided equally among them, the issue of such of them as may be dead succeeding to their father or mother's share." "And on the other part, as the said William Kippen" (it is recited) "is desirous of securing upon his said daughter in liferent, for her liferent use allenarly, and upon her children of the present marriage in fee, whom failing, upon her own heirs or next of kin in fee, the sum of 5,000*l.*

sterling; and as his object can be best secured by the creation of a trust," he appoints trustees, and he "binds and obliges himself, and his heirs, executors, and successors, to make payment to the said trustees or their foresaids of the said sum of 5,000*l.* sterling, 1,000*l.* sterling thereof at Martinmas next, and 4,000*l.* sterling thereof at the end of twelve months from the date of the said William Kippen's death, with interest thereon from the time of payment till actual payment." And then the deed contains a clause that they are to "make payment of the annual interest thereof to the said Marianne Kippen as an alimentary provision, free from her own debts or deeds, and the diligence or execution of her creditors, or the deeds of the said John James Alston, and the diligence or execution of his creditors; and upon the death of the said Marianne Kippen, they shall divide the said sum of 5,000*l.* sterling equally among all her children of the present marriage, with power, nevertheless, to the said Marianne Kippen and John James Alston, and to the survivor of them, at any time during their or the survivor's lifetime, and even on death-bed, by any writing under their or the survivor's hands, to divide and proportion the said sum of 5,000*l.* among said children, as they or the survivor shall think proper."

Then it is declared, "that in the event of there being no children of this marriage, the foresaid sum shall go and belong to the nearest of kin of the said Marianne Kippen, which foresaid provisions in favour of the said Marianne Kippen stipulated by the said John James Alston, she, with consent foresaid, hereby accepts of in full of all terce, *jus relictæ*, half or third of moveables, and every other claim which she or her next of kin might or could claim at the dissolution of the marriage, all which she hereby renounces and dis-

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charges. And the foresaid provisions stipulated in favour of the said children shall be in full to them of all legitim, bairns' part of gear, or any other claim which they by law may be entitled to at the decease of the said John James Alston, or at the dissolution of the marriage, all which are hereby discharged, save and except what further provisions the said John James Alston may of his own free will make in their favour, and save and except, in the event of his dying intestate, their claim to a share of his estate and effects. And the said Marianne Kippen and John James Alston hereby accept of the foresaid stipulations and provisions by the said William Kippen, in favour of his said daughter and her children, secured by the foresaid trust, in full of any share or provision which the said Marianne Kippen is entitled to by the contract of marriage betwixt the said William Kippen and Marianne Alston, mother of the said Marianne Kippen, and every other provision, whether legal or conventional, competent to be made against the said William Kippen, or his means and estate, or his heirs or successors after his death."

After the marriages of the two daughters, Marianne and Christina, and on the 17th of July 1849, William Kippen executed a trust disposition and deed of settlement of his property. After appointing trustees, he directed them, in the first place, to pay to his "son, William Kippen, the sum of 2,000*l.* sterling at the expiry of twelve months after" his death, "but under deduction always of such sum or sums as I may have advanced to him or for his behoof, according to a statement thereof in my ledger." And then, in the next place, he directed and appointed his trustees, "to set apart from the first and readiest of my means and estate, real and personal, not otherwise specially destined, the sum of 4,000*l.* sterling for each and every

one of my daughters, Margaret Kippen, Jane Dennistoun Kippen, and Elizabeth Kippen, and for the lawful issue of such of them as may have died leaving such issue, as coming in place and as in right of their deceased parent, and to invest and secure the said sum for behoof of each of my said daughters in liferent, for her liferent use allenarly during all the days and years of her natural life, exclusive of the *jus mariti*, or right of administration of any husband whom she may have married or may marry, and of her lawful issue, share and share alike, in fee and property, and that in any such way and manner as to my said trustees may seem best calculated for carrying out this my intention; and the said provision shall bear interest from the date of investment, or if not invested within twelve months after my death, then from the lapse of said time until the same is so invested, declaring that in case any of my daughters surviving me shall happen to die without leaving lawful issue, it shall be in her power, by any deed or other writing under her hand, to legate and bequeath the said sum of 4,000*l.* sterling hereby provided to her in liferent, to any person or persons she may judge proper, and failing thereof the same shall revert to and form part of the residue of my estate." And then he takes notice that he had "already provided for his two daughters, Marianne Kippen, wife of John James Alston, and for Christina Dennistoun Kippen, wife of the Rev. William Shaw, of Bonhill, by the marriage contracts between them and their said husbands;" and he declared "that the provisions therein made in favour of his said two daughters were in full of all they could claim or were entitled to receive from his estate." He then, in the fifth place, directs and appoints his trustees "to make payment of the sum of 6,000*l.* to my son, George Kippen, at the end of twelve months after my death,

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with interest thereof from said period and until the same is paid; but said provision shall be subject to deduction of all sums which shall be owing to me by my said son at my death, as the same shall appear by my books or other writings showing the amount of said debts." And then there is this clause:—"And which provisions above written, conceived in favour of my said children, shall be accepted of by them, and the same are hereby declared to be, in full of all legitim portion, bairns' part of gear, executory or others whatsoever, which they or any of them can ask or demand by and through my decease, or in any other manner of way."

William Kippen afterwards, by an instrument called his first codicil, dated the 10th January 1850, revoked and recalled the bequest to his two daughters, Jane Dennistoun and Elizabeth, and instead thereof he appoints them "an annuity of 120*l.*, exclusive of the *jus mariti* of their respective husbands in the event of their marriage, and of their debts and deeds, and the diligence of their creditors." And then he says, "And with these alterations and additions I hereby approve and confirm my said deed of settlement in all other respects."

After the execution of this first codicil, Margaret married Mr. Edmiston, and by her marriage contract, not prepared as those of her sisters by their brother, but to which William Kippen, the father, was a party, dated 14th December 1850, Edmiston obliges himself to pay her a jointure of 150*l.*, and provides and secures to the children of the marriage his whole estate, heritable and moveable, "and these provisions are to be made in full satisfaction to her of all terce of lands, half or third of moveables," or anything else which she might claim by reason of her marriage. And then William Kippen, on his part, "for

the causes aforesaid, binds and obliges himself, and his heirs, executors, successors, and representatives whomsoever, to pay," amongst other things, to his daughters "the sum of 5,000*l.* as a tocher for the said Margaret Kippen, his daughter, payable as follows, viz., the sum of 1,000*l.* at the term of Whitsunday, 1851, with interest thereafter till paid, and the remaining sum of 4,000*l.* at the first term of Whitsunday or Martinmas occurring after the lapse of twelve months from the death of the said William Kippen, with the legal interest thereof thereafter till payment. And it is hereby specially covenanted and agreed upon, between the parties contractors, that the said trustees or their foresaids shall hold the interest of the whole foresaid sum of 5,000*l.*, as the same becomes payable, in trust for the said Margaret Kippen in liferent for her liferent alimentary use allenarly, exclusive of the *jus mariti* or right of administration of the said Hugh Fleming Edmiston, or any future husband of the said Margaret Kippen, and unaffectable by his debts or deeds, or by the diligence of his creditors for payment or performance of any of his debts or obligations, and the said trustees or their foresaids shall hold the said principal sum of 5,000*l.* in trust for the children of this marriage equally among them (if more than one), share and share alike."

And then it declared "that in the event of the dissolution of this marriage by the death of the said Margaret Kippen without issue, or in the event of there being issue of the marriage at her death all of whom shall die before attaining the age of 21 years without lawful issue, then and in either of these events the said tocher of 5,000*l.* shall revert to the said William Kippen and his heirs and assigns whomsoever; and in the event of his death before the said Margaret Kippen, then the said trustees or their fore-

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saids shall pay over the said sum of 5,000*l.* to the sons of the said William Kippen who may be alive at the time and to the issue of the predeceasers equally among them, the issue drawing the share which would have fallen to their father had he survived the said Margaret Kippen."

Your Lordships will observe that there is no such clause in this marriage contract as that which is contained in the marriage contract of Marianne and Christina, that Margaret and her husband accept of the provisions by William Kippen, secured by the trust, in full of every provision "whether legal or conventional, competent to be made against the said William Kippen or his means and estate, or his heirs or successors after his death."

After this marriage contract, William Kippen made two other codicils, one dated on the 6th of January 1852, and the other on the 7th of January 1853; by the former he restored to his daughters Jane and Elizabeth the 4,000*l.* which he had given to them under his trust disposition, he revoked the legacy of 2,000*l.* to William, and reduced by 2,000*l.* the legacy of 6,000*l.* that was given to George; and then the codicil states, "and with the above alterations I do hereby confirm my said trust disposition and deed of settlement in all other respects." And by the latter codicil he again took away the 4,000*l.* to his two daughters, and left them with their annuities of 120*l.*, and added these words, "and with these alterations I hereby approve of and confirm my deed of settlement in all other respects."

My Lords, upon all these different instruments and writings the question arises, whether the provision made for Mrs. Margaret Edmiston in her marriage contract was intended to be an addition to the benefit which was given to her by her father's trust disposition, and also to that which she was entitled to under

his marriage contract, or whether it was to be taken in satisfaction of all her antecedent rights and claims.

This latter proposition is strongly contended for by the Appellants, who assert that by the law of Scotland the word "tocher," *ex vi termini*, or any provision made by a father upon his daughter's marriage without the use of that word, is presumed to be in extinguishment of all subsisting claims which the daughter has on her father's estate, and that no words of discharge or satisfaction are necessary to give this effect to the deed. And they maintain that the law of Scotland, like the law of England, presumes against double portions to children, and that this presumption requires to be rebutted by proof to the contrary. The Respondents, on the other hand, insist that there is no such presumption in the law of Scotland; that every case of this description is one entirely of intention, depending upon its own circumstances, and governed by no general rule.

My Lords, in this country the leaning or presumption against double portions is settled by a long course of decisions, and though the rule may have been characterised as an artificial one, and there may be found occasional expressions of disapprobation of it by some Judges, and of regret that it should ever have been established, yet it is too firmly fixed as a canon or rule of construction in our law to be lightly departed from. Whether there is a similar rule of presumption in Scotland is a question upon which, unfortunately, the greatest diversity of opinion prevails.

To show your Lordships how little assistance upon this essential preliminary to the correct adjudication of the present case can be derived from the judgments of the learned Judges, it will be sufficient to select some of the strongest and most decisive expressions of each class of opinions, as to the existence or non-

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existence of this rule of presumption. The *Lord Justice Clerk* says, "It is of great importance to keep in view that there is no rule or legal presumption (as the Counsel for the residuary legatees distinctly admitted) in the law of Scotland that a provision to a daughter in her marriage contract supersedes, or evacuates, or recalls a bequest in her favour in a prior testamentary writing. It is necessary to keep this in view from the outset, for the residuary legatees have, notwithstanding the above admission, borrowed much of their arguments from the law of England, which seems to be widely different." Lord *Curriehill*, after adverting to the rule as it prevails in England, says, "This artificial rule appears to be followed out in England to its legitimate consequences, insomuch that the legacy is held, not indeed to be satisfied or implemented, but to be altogether *rescinded* by the subsequent provision, even although the latter should be less in amount than the former." And then he says, "But the canon of construction on which in England this class of cases is founded, forms no part of the law of Scotland; and indeed, even its technical denomination, 'the ademption of legacies,' is unknown in the juridical language of this country; and, considering its artificial nature and its tendencies, I do not think that it ought now to be introduced. I am strongly confirmed in this opinion when I see in what light it is viewed in the country where it operates, and which is thus stated by Roper on Legacies (*a*):—'The artificial doctrine of the Court before stated, in regard to presumptive ademption, has met with severe reproof from modern Judges, as tending to defeat the intention of parents.'"

On the other hand, Lord *Ardmillan* (who agreed in the result with the *Lord Justice Clerk* that there was no ademption in this case) says, "I am, however, not

(*a*) Vol. i. p. 324.

quite satisfied that, between the principles of construction applicable to such a case by the law of Scotland, and those recognized by the more recent judgments in the law of England, the difference is so great as seems to be assumed in the opinion of the *Lord Justice Clerk.* I am disposed to think that, although the mode of expressing the rules of construction differs, yet the principles of construction, as now understood, are substantially the same. In both countries the question really resolves into one of intention. There is no inflexible rule, and no absolute presumption; while there is in both countries a presumption against a double portion to one child, not absolute or unbending, but simply an element, of greater or less weight, according to circumstances, to be considered in the search for the true meaning of the testator." Lord *Deas*, who was the Lord Ordinary who had originally pronounced the interlocutor against the double portion, says, "I have only to add that when I pronounced my judgment in the Outer House, I was not aware of the cases and authorities in the law of England to which I latterly referred the parties, and which, although not previously noticed at the bar, were consequently commented on at the hearing before the whole Court, and are alluded to in the opinions of the consulted Judges." "But it certainly does not diminish my confidence in the soundness of the leading principle on which I proceeded, and which I then regarded, and still regard, as deeply founded in the law of Scotland, that I find the same principle recognized and acted on in an enlightened system of jurisprudence like that of England, connected as it is with a subject not involved in any such technicalities as to prevent our understanding what English lawyers say about it, and founded, as I think it is, upon views which, so far as they apply to a case

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like the present, recommend themselves by their natural justice, and, I would almost say, by their common sense."

In this unfortunate conflict of opinions amongst the learned Judges, your Lordships are left without the aid of your natural guides in the law which it is their duty to administer, and are compelled, from such materials as the writings of the Scotch Jurists and the reported decisions of the Scotch Courts supply, to form your own judgment on this leading question. My Lords, after a very careful consideration of all these authorities, I have been led to the conclusion that there is no satisfactory proof that the general presumption contended for by the Appellants exists as a canon or rule of construction which is to be arbitrarily applied in the first instance to the construction of deeds of provision for children, and which must prevail unless it is rebutted by proof of a contrary intention. I do find a rule of presumption of a more limited description, by which cases respecting children's portions have been sometimes governed, and by which they are to be explained, and which is expressed in the well known formula, "*debitor non præsumitur donare.*" This is so far from corresponding with the rule of the English Courts that it will be found that, although in them the presumption is in favour of the ademption of a legacy by a portion, and of the satisfaction of a portion by a legacy, yet with regard to the discharge of a debt by a legacy, their leaning or presumption is rather in a contrary direction.

In the law of Scotland it does not appear that any general antecedent presumption exists against double portions.

Where, however, the prior provision was obligatory—as by bond—constituting an actual debt in favour of the child, a subsequent provision will by the law of Scotland be deemed a satisfaction of the debt, upon the principle *debitor non præsumitur donare.*

The importance of ascertaining the rule which is to be applied in this case will justify a closer examination of the subject.

It appears from the text writers upon the law of Scotland, that until a comparatively recent period provisions for children were not made by trust dis-

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positions or deeds of settlement, but by what were called bonds of provision, to take effect after the father's death. These were generally kept by the father in his own possession, but yet were effectual against his estate without delivery. If delivered by the father to the child, they were irrevocable, and a debt was created. But while the bonds were in the father's power, no debt was effectually contracted; and if other bonds of provision were subsequently granted without reference to the former ones, they were understood to be, not in satisfaction, but in addition to the child's patrimony,—the rule of *debitor non præsumitur donare* not applying.

But it was asserted in argument that, with respect to a settlement by a father upon his daughter in her name, whether made by the name of tocher or otherwise, there was a rule which invariably prevailed in the Scotch law, to presume it to be in lieu of all former provisions. Various authorities were adduced, which, when examined, do not appear to bear out the proposition to the unqualified extent to which it was asserted. In Bankton's Institutes (*a*) it is said, "Rights granted to children will be understood in implement of the provisions contracted in the marriage articles to them when *nascituri*, and both will not be due; for in these cases the design of the father is evidently to exoner himself of the prior obligations." In this passage, your Lordships will observe that the learned author is dealing solely with provisions *in obligatione*. In Stair's Institutes (*b*) it is said, "A tocher in a contract of marriage was found to be in satisfaction of all former provisions, though it did not so express;" and Young's case is referred to, which will be afterwards more particularly mentioned, where the prior provision was also *in obligatione*.

(*a*) B. 1, t. 6. (*b*) B. 1, t. 8, s. 2.

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But a passage from Erskine's Institute (*a*), cited by the Appellants' Counsel, goes the whole length of the proposition for which they contend, for it is there stated without any qualification, "that a settlement to a daughter in a marriage contract is presumed to be granted in satisfaction or solution of all former provisions, though it should not bear the words *in satisfaction*, because provisions granted by fathers in marriage contracts are generally intended to comprehend the whole estate that is to be expected by the husband from the wife or her father in name of tocher." But these general expressions used by Erskine on the subject of presumption must be understood with limitation, as was said by Lord *Fullerton* in the case of *Grant* v. *Anderson* (*b*) :—"In all the cases in which the principle laid down by Erskine was applied, the prior provision had been *in obligatione*, and the judgment was put expressly upon the maxim *debitor non præsumitur donare*." And upon a careful consideration of all the cases which were cited from the Dictionary of Decisions (*c*), between the pages 11,361 and 11,474, your Lordships will find that they are almost all of them resolvable into the same principle.

In the case already mentioned, of *Grant* v. *Anderson*, the language of Lord *Mackenzie* confirms this view of the previous authorities in the strongest manner. He says, "I cannot find one case in which a provision by will not obligatory was held to be satisfied by a provision in a contract of marriage." It is true that the *Lord Ordinary* in that case speaks of the decisions as having established the presumption contended for in the most unqualified terms. After stating that the leaning of the Scotch law from an early period in the construction of successive testamentary bequests of the same amount to the same

(*a*) B. 3, t. 3, s. 93. (*b*) 3 Sec. Ser. 97.
(*c*) Morrison's Dictionary of Scotch Cases.

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legatee has been to presume duplication, he proceeds (*a*), "but at the very time that this construction was first given to proper testamentary deeds, it seems to have been laid down in a series of cases, alike uniform and positive in their conclusion, that a tocher provided and secured by a father in his child's marriage contract must be presumed as given in satisfaction, either in whole or in part, as the case may be, of any anterior provision to that child, and not as a new and additional provision. There are few points in law settled by a more numerous class of decisions. In the Dictionary (*b*) there is a whole section entitled 'Tocher granted in a contract of marriage, how far presumed in satisfaction of former provisions.' They all show that the tocher is presumed to be in satisfaction of the prior provision, even without any express declaration to that effect. To these may be added various cases under other heads, in particular the case of *Stenhouse*, in 1837 (*c*), and *Matheson*, in 1766 (*d*)." *Stenhouse's* case is the same as *Young's* case, referred to by Lord Stair, and there the first provision was *in obligatione*, being contained in the father's marriage contract providing for the heirs or bairns of the marriage. And *Matheson's* case is of a similar description, for there the prior provision was contained in the marriage contract of the father, by which he became bound "to pay a certain sum to the eldest or only daughter to be procreated of the marriage."

It appears, therefore, that no authority can be adduced in favour of the general presumption founded upon by the Appellants in the case of a tocher or provision on the marriage of a child, and that *Grant* v. *Anderson* was the first case in which that question

(*a*) 3 Sec. Ser. 94. (*b*) *Voce* Presumption, 11,474.
(*c*) Morr. 11,444. (*d*) Morr. 11,453.

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arose for determination unconnected with the doctrine of *debitor non præsumitur donare.* If there had been any such established presumption, it is inconceivable that Lord *Mackenzie* and the other Judges should have found that case to be one of considerable difficulty, for it was clearly a case of provision made on the marriage of a daughter, and the *Lord Ordinary* had decided expressly upon the force and effect of the tocher which was so provided. And how did the Court proceed in that case? Did it set out with this antecedent presumption as its guide? On the contrary, the Judges examined carefully the circumstances, arrived at their conclusion with hesitation and difficulty, and, as Lord *Fullerton* expresses it, viewed it merely as a question of intention, and found the preponderance to be in favour of the Defenders.

Nimmo's case (*a*), the only other modern one amongst the Scotch cases cited by the Appellants upon this point, was in fact a case in which the rule of "*debitor non præsumitur donare*" was applicable; because there the daughter's marriage contract, which was made by the father, and which was *in obligatione,* preceded the provisions made by the father in a trust settlement. The Judges, however, appear not to have decided this case upon any rule of presumption, but, as the *Lord Justice Clerk* expresses it, "upon the will and intention of the testator to be discovered from the whole of the deeds to which he was a party." And Lord *Moncrieff* says, "After a full hearing, and examining all the authorities, I can find no unbending rule which can make it indispensable to hold that there is a double provision of the same sum in this case if it be contrary to evident intention, as I think it is. There may be presumptions both ways; but when all the cases are considered together,

(*a*) 3 Sec. Ser. 1109.

they convince me that they were always considered as special, depending on the intention legally evinced in the particular deed. The rule in Erskine is much founded on as making a distinction between the case of double legacies and that of double provisions by a father to children. But what is there stated is confessedly but an exception from what is otherwise the general rule, that '*debitor non præsumitur donare*,' and that simply by a contrary presumption in favour of additional bonds of provision by a father to a child. But that contrary presumption must yield also to the presumption of intention arising upon the face of the deeds."

This long but necessary examination of the various authorities has led me at last to the conclusion which I have already stated, that there is no such settled presumption with respect to deeds of provision for children by the law of Scotland as is contended for by the Appellants. Nor is it unimportant to ascertain this point clearly, in order to arrive at a satisfactory decision of the present case; because it must be a vital distinction which will essentially affect the conclusion, whether the parties are to start with a canon or rule of construction which is to be arbitrarily applied, and which is to prevail until rebutted by proof of a contrary intention; or whether the intention is to be subjected to no original controlling force, but is to be gathered from the expression of it to be found in the deeds themselves.

My Lords, the question then in this case is, as the *Lord Justice Clerk* says in *Nimmo's* case, "truly *questio voluntatis.*" And how is this will and intention to be discovered but, as he also says, "from the whole of the deeds, and not from taking the terms in which any one of them is conceived, or even two of them"? There is no other mode of ascertaining the

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mind of a party, but by the acts which he has done or the words which he has used. If a father gives the same amount of money to a child by two different instruments, unless it appears, either expressly or by necessary implication, that he intended the one to be in satisfaction of the other, or unless there is an arbitrary rule which authoritatively pronounces that they must be so considered, why is the law to force such an intention upon his acts, which may be in direct contravention of them? To search for the intention of a party anywhere else than in his own declarations of it, is to substitute conjecture for construction. There is no antecedent improbability that a father should be desirous of favouring one child more than another; and if this should be the obvious meaning of his acts, what is there in it which so violates the notions of propriety as to induce the law to force a totally different intention upon him?

If a father gives his child the same amount of money by two different instruments, unless it appear either expressly or by necessary implication that he *intended* the one to be in satisfaction of the other, the law of Scotland will not *presume* that he meant the one to be in satisfaction of the other.

To apply these observations to the present case, and treating it as one in which the intention is to be sought for in the deeds themselves, there appears to be no one circumstance in the different dealings of the father with his children which clearly shows that he meant to do exactly the same towards Mrs. Edmiston as towards his other daughters. The idea of intentional equality amongst them must be confined to those who married; for, with respect to the unmarried daughters, the father's intention is manifested at the last to place them on a different footing from the rest. And as to the assumed desire of establishing perfect equality amongst the married daughters, I do not know why the difference in their marriage contracts is not to have its due weight, as indicating a different intention respecting them. In the marriage contracts of the daughters Marianne and Christina (*a*), there is a

(*a*) *Suprà*, p. 206.

clause, to which I have already more than once adverted, that they and their husbands accept the provision which was made for them in favour of all claim which they might have upon their father's estate," while there is no such clause to be found in Margaret's marriage settlement (*a*). It has been argued that this may have arisen from the deeds having been prepared by different hands; George Kippen, the brother, having prepared the two first marriage contracts, and another writer having prepared that of Margaret. On the one hand, this is attributed to the wish of the father to conceal from his son the great difference which he was making in his bounty to his daughters by giving Margaret a double portion. On the other hand, the circumstance is more naturally accounted for from the fact of George Kippen being under sequestration at the time of Margaret's marriage. But whoever prepared the deeds, and from whatever cause, they are all alike the deeds of William Kippen; it is his meaning which they express; and this marked distinction between them cannot be disregarded in an inquiry into his intention.

The codicils which were made after Mrs. Edmiston's marriage contract are not so important for the provisions which they contain as for the fact that on the occasions of making both of them William Kippen must have had distinctly brought to his attention the clause in the trust deposition under which Mrs. Edmiston took the same sum of 4,000*l.* as her sisters Jane and Elizabeth. And when the father, by the second codicil, restores his two other daughters to the benefit of the settlement (*b*), and takes no notice of Margaret and her marriage contract, as by the settlement itself in the clause immediately following the one giving the 4,000*l.* he had noticed

(*a*) *Suprà*, p. 207. (*b*) *Suprà*, p. 207.

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the marriage contracts of his two daughters Marianne and Christina, and had declared that the provisions therein made in their favour were in full of all they could claim or were entitled to receive from his estate, it seems to be strongly indicative of an intended distinction between them.

I do not lay much stress upon the revocation of the bequest to one of his sons and the reduction of the bequest to the other, because they were in accordance with the trust deposition, which provided by anticipation for the state of things which occasioned them, and they are only important as contributing to keep the settlement in the father's view.

A similar observation may be made upon the clauses in both of the codicils :—"And with the above alterations I do hereby confirm my said trust disposition and deed of settlement in all other respects." To give a confirming effect to the double provision by these words would be to beg the whole question. If the benefit to Margaret by the trust disposition were revoked by her marriage contract, this clause could not restore it; and if it were not, it was not wanted to give it continuance. But regarding this as a question of intention to be collected from the deeds, it is impossible to overlook the inference which is to be drawn from the difference between the provisions in Margaret's marriage contract and in the trust disposition.

There is no correspondence of amount in the sums in the two deeds, and the limitations of them are essentially different. The 4,000*l.* in the trust deed is given to Margaret in liferent, and afterwards to all her children, with a power to her to dispose of the capital if she died without issue. Under her marriage contract the gift is confined to the children of that marriage, and none of her children by any future

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marriage are to participate in it, and even the children of the marriage are not to be entitled unless they attain majority. And instead of the capital being left to the uncontrolled disposal of Mrs. Edmiston in case she died without children, it was to go in that event to Mr. Kippen, her father, or to his sons. Differences such as these are of material consideration, not merely as excluding the idea of any supposed intention in opposition to the language of the instruments themselves, but as confirming their import and effect. My Lords, my judgment proceeds entirely upon the ground of allowing a party to express his own intentions in the instruments which he executes, without undertaking the task of conjecturing what h was likely to have done If the law forced upon me a presumption not upon the face of the deeds, it would be my duty to yield to it; but being left free from any such control, I have no other guide than that which the deeds themselves furnish, and which is safer than any conjecture which I could form. Confining myself, therefore, entirely to these as recording the intention of William Kippen the settlor, and rejecting all extrinsic views of probability which would impose a conjectural meaning upon him different from that which he has distinctly expressed, I agree with the majority of the Judges of the Court of Session that the provisions made for Mrs. Edmiston in her contract of marriage were not in satisfaction of the provision made in her favour by the trust disposition and settlement of Mr. Kippen; and therefore I recommend to your Lordships to affirm the Interlocutors appealed from.

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Lord CRANWORTH:

My Lords, this question was twice very elaborately argued in the Courts below, and the result of those arguments has been that the great majority of the

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Judges have come to the conclusion that there is no such presumption in the law of Scotland as exists in England against what we call double portions, and that consequently Mrs. Edmiston is entitled, not merely to that which she takes under her marriage contract, but also to the previous provision which had been made for her by the will of her father.

The case has also been very elaborately argued here, and I have ascertained by communication with my noble and learned friend opposite (*a*), that he concurs with the Court below, while my noble and learned friend on the woolsack has already very elaborately and ably stated his grounds for coming to the same conclusion.

I have, my Lords, arrived at a contrary result, but with a great distrust of my own opinion, which, however, it is my duty to state, though it can have no practical effect on the judgment to be pronounced (*b*). The grounds on which I proceed I will explain shortly to your Lordships. In the first place, I hold, upon the authorities, that there *is* such a presumption in the law of Scotland as exists in England; and, secondly, I apprehend that if such a presumption exists in the law of both countries, there is nothing in the facts of this case to remove it from the operation of that *primâ facie* presumption.

The law of Scotland presumes against duplication and in so doing, corresponds with the law of England.

When I say I think that presumption exists in the law of Scotland, I am guided to that conclusion by the text writers and by what appears to me the weight of the authorities.

With respect to the text writers, we who are in the habit of assisting here in the administration of Scotch law know that Lord Stair, Lord Bankton, and Mr. Erskine are authorities as text writers to which we refer almost as we should to Coke or Littleton

(*a*) Lord Wensleydale.
(*b*) His Lordship was but one against two.

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in England. All those three great authorities appear to me to lay down the proposition that there is such a presumption. Lord Stair, the earliest authority,—perhaps, in some respects, the greatest,—states it, but with more hesitation, because it had not in his time been so much elaborated or investigated; and the other two authorities state it without any difficulty or hesitation, in terms which apply to the present ase as well as to cases where the claim is merely *ex obligatione.*

In order to bear out that view of the case, I have copied from those text writers the different propositions which they have laid down, which I think warrant me in the conclusion at which I have arrived. Lord Stair says (*a*):—"Bonds, assignations, or other rights in the names of children, unforisfamiliat and unprovided, are presumed to be donations." And then he gives the reasons for that:—"And bonds of provision to children are not interpreted in satisfaction of prior bonds, but to be a further addition, and so are any other rights taken in the name of children, especially if unforisfamiliat. Yet a tocher (*b*) in a contract of marriage was found to be in satisfaction of all former provision, though it did not so express." And then he refers to a case which undoubtedly was a case in which the first provision was a provision strictly *ex obligatione.* From the language of Lord Stair, I think I am entitled to infer that the question was somewhat new at that time. He does not lay down the doctrine very positively, but says it has been so found; expresses no objection to the doctrine, but affirms it as applicable to what I presume to have been other cases that had in his time existed.

Bankton says, in the passage immediately follow-

(*a*) B. 1, t. 8, sect. 2.

(*b*) A tocher is equivalent to dowry, from *Dos.*

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ing that cited by my noble and learned friend on the woolsack (*a*), "Bonds of provision" (that is, for children) "will be effectual against the heir without delivery or a dispensing clause. But a disposition of the estate to the heir, posterior in date but prior to the delivery of such bonds, will not subject him as successor, *titulo lucrativo, post contractum debitum;* because while bonds are in the father's power the debt is not effectually contracted." In fact, he merely elaborates the proposition that bonds of provision, though undelivered, are valid if they remain in the custody of the maker of them down to his death, *i. e.*, they are valid against the heir, though, if the owner of the estate should part with it to the heir in his lifetime, they are not such debts as would then affect the estate. But Lord Bankton goes on to say, "Mere bonds of provision being granted to a child in family without relation of the one to the other, they will be all due. The case is different where a portion is contracted with a daughter in her marriage settlement, which will be presumed in satisfaction of former provisions or other claims against the father."

He is speaking there of bonds of provision such as he was alluding to in the former part of that paragraph, and he says that a provision made for the daughter upon her marriage will be presumed to have been made in satisfaction of former provisions, that is to say, if there is nothing to vary the case on the one side or the other, the provision made on the marriage is presumed to be that which a second bond of provision would not have been presumed to be, namely, in satisfaction of the previous bond or of all bonds which had gone before. Now, it appears to me that Bankton here lays down the law as the law is in this country, which is that, *primâ facie*, if a

(*a*) B. 1, t. 6, sect. 5.

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provision is made by a parent on the marriage of his child, that is presumed to be in satisfaction of what he had previously intended and indicated by, not a bond of provision, for in this country there is no such thing as a bond of provision, but by what is equivalent to it, his will—a voluntary provision, which would be effectual if it remained uncancelled at the time of his death.

Erskine (*a*) says:—"The rule *debitor non præsumitur donare* being only a presumption, must yield to contrary presumptions. Hence, bonds of provision by a father to a child, especially one who is not *forisfamiliated*, are, from the presumption of paternal affection, understood to be granted, not in satisfaction of former bonds, but in addition to the child's patrimony." He refers to Lord Stair for that. "But even this presumption may be overruled by circumstances which point out an intention in the father to include the first bond in the last." I infer from all this, following the reference to Lord Stair, that Erskine considered this doctrine to have been more elaborately gone into since the time of Lord Stair. "Thus," he says, "a settlement to a daughter in a marriage contract is presumed to be granted in satisfaction or solution of all former provisions, though it should not bear the words '*in satisfaction,*' because provisions granted by fathers in marriage contracts are generally intended to comprehend the whole estate that is to be expected by the husband from the wife or her father in the name of tocher." That is the way in which the doctrine is laid down by Erskine, and which, as well as the passage from Bankton, would, I conceive, fully bear out the proposition that the presumption in Scotland is the same as the presumption in England.

My Lords, I must here observe that when it is said by the learned Judges in Scotland that this principle

(*b*) B. 3, t. 4, sect. 98.

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of the law of England has been often reprobated, I question whether that is a fair way of representing what has been said by the Judges in England. The extent to which the doctrine has been carried has been reprobated; but I am not aware of any case in which any Judge has, *ex cathedrâ*, said that that is a principle that ought not to prevail; and if they had said so, I confess that I think they would have been saying something that experience would not warrant as a fair inference of fact. Because when a parent does, upon the marriage of his daughter, make a provision for her, *primâ facie*, the presumption is that he means that provision to be in satisfaction of what he otherwise intended to have given her. Take the common case of a parent having left by his will a legacy of 10,000*l.* to his daughter, and afterwards the daughter marrying, and he then settles 10,000*l.* upon her, I believe that his intention would, in 99 cases out of a hundred, be defeated if she were allowed to take the legacy as well as the provision. Therefore I do not agree to the proposition that seems to have been taken for granted by some of the Judges of the Court below, that the doctrine in England is one which as a simple doctrine has been reprobated by Judges here, or that has been considered to be a doctrine that ought not to prevail. However, whether it is right or wrong, that it does prevail in England is a matter beyond all doubt; and unless I reject the authority of Bankton, Erskine, and Lord Stair, Lord Stair speaking more diffidently because the question does not seem in his time to have been much discussed, I have very great difficulty in saying that the same doctrine must not be held to apply in Scotland unless you say that those very learned writers have come to a wrong conclusion.

If a parent, having left by his will 10,000*l.* to his daughter on her marriage, afterwards settles 10,000*l.* upon her, it would in 99 cases out of 100 defeat his intention if she were allowed to take the two sums.

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But now let us see what the early authorities are which either bear out or militate against this proposition. It is perfectly true, as was observed by my noble and learned friend, who referred to many of the opinions that we have before us, that a whole chapter, a whole head in Morrison (*a*) has reference entirely to this question. They are all more or less ancient cases, —a century or two old. My Lords, it is perfectly true that upon looking at these cases it appears that the greater portion of them are cases in which the prior provision had been *ex obligatione*. I do not know that that much affects the case; but if it did, they are not all so. There are two, particularly, which are not so, one certainly, and the other in such terms that it may be doubtful whether it is or is not so to be considered. I allude to the case of *Belchies* v. *Murray* (*b*), where a gentleman of the name of Murray made a trust disposition and settlement of his estate upon some relation (being a single man himself), charged with a legacy of 300*l*. to his niece, Amelia Belchies. That was in the year 1738. Two years afterwards he revoked that settlement and made a new one, and settled his property upon the Defender Murray, but subject to the legacy which he had given in the former settlement. It appears that soon afterwards Amelia Belchies married, and she had two sons, and after she had the two sons, namely, in the year 1744, Mr. Murray executed a bond to her to pay 1,200*l*. to her and her husband and her children, making a sort of family provision for them. My Lords, it was held after the death of Murray that that 1,200*l*. being paid (of course they had a right to claim that), Amelia Belchies and her family could not claim the other 300*l*., but that the one was in substitution for the other.

(*a*) Morrison's Dictionary of Scotch Decisions.
(*b*) Morr. 11,361.

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If that had been the only case, I should not have felt that that was a case which entirely bore out Erskine and Bankton, because it was not the case of a father by a tocher providing for his daughter. It might have been, though it was not stated, that it was done by a person standing *in loco parentis*; but that does not appear, so far as I collect from the report. There is, however, another case reported very soon afterwards, of *Dows* v. *Dow* (*a*), which seems to me to go the full length of what these learned institutional writers lay down. In *Dows* v. *Dow* a bond of provision had been made by John Dow in favour of his children, four daughters, and if he should die without issue male, then the bond secured further provisions for them. He had at that time a son, who afterwards died without issue, or at least without issue male. I believe without issue, never having married. And the consequence was, that the estate, I suppose in virtue of some entail, passed to a distant collateral male heir. It was held, upon the question arising between the daughters and the distant male heir, that the tocher having been given by the father upon the marriage of such of his daughters as had married, the tocher mentioned in their marriage contracts was in satisfaction of all former provisions, though not so expressed. But then the Court said,—"If they were contracted" (that is, if the daughters were married, that is the meaning of it) "before their brother died, then they were not thereby excluded from the additional provision incident thereafter by the succession of the other heir male." That was good sense, because what the father had provided was in the one event a particular portion, and if a subsequent event should happen, a larger portion. The daughters married before the subsequent event had happened.

(*a*) Morr. 11,477.

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Then, say the Judges, what you have as tocher must be in satisfaction of what was given to you, *rebus sic stantibus*, at the time of the marriage; but it does not preclude your claiming that which you may be entitled to upon the subsequent event happening, which, according to the provision, gave you a larger interest, and which could not have been intended to have been compensated for by the father, because *non constat* that that further provision ever would arise.

Now, it appears to me that that case goes the whole length of recognizing this proposition, because, although the provision was not by a trust settlement and disposition, the difference is a mere matter of form. We learn from this case that the system of giving bonds of provision as a mode of providing for children was one that, till a very recent period, was the only mode, or almost the only mode, in which such provisions could have been made. And Lord *Murray* states that in his experience in his early practice at the Bar, it was the common mode of providing for children. The principle really was, that if you make a voluntary provision for a child, though it be voluntary, yet if you afterwards give a tocher to the child upon his marriage, that supersedes the previous intended voluntary provision.

How has that principle been borne out and acted upon in more modern times? Unless I were to hold that the two cases of *Grant* v. *Anderson* and *Smith* v. *Nimmo* were wrongly decided, I am unable to come to any other conclusion but that the Courts have acted upon the principle laid down by Bankton and Erskine, and acted upon it as being the clear law of Scotland.

In the case of *Grant* v. *Anderson*, which was decided in 1840, a settlement had been made by Anderson, whereby he secured 2,000*l.* to his daughter.

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That settlement was made in 1829. In 1830 the daughter married Mr. Grant, and upon the occasion of the marriage the father bound himself on his death to pay 2,000*l.* for his daughter and her family in lieu of all claims except good will; that is, it would not exclude what he gave to her by way of bequest,—she took it in lieu of all claim of legitim or any other claim that she might set up as a legal claim against him, but not of anything that he might leave to her. The question was, whether after that settlement she was entitled to claim, not only what she had under the settlement, but what had been given to her by will? And it was held that she was not (*a*).

That case was very elaborately discussed, and Lord *Mackenzie*, a very able and very painstaking Judge, investigated it fully, and stated that he had been unable to discover one instance in which a provision by will not obligatory was held to be satisfied by a provision in a marriage contract. That may be very true, literally speaking. It did not apply to a provision by will, but it applied to voluntary provisions revocable up to the time of death. Therefore it seems to me, that the distinction between a bond of provision and a will is a distinction too weak to be supported. He says very truly, "I cannot find one case in which a provision by a will not obligatory was held to be satisfied by a provision in a contract of marriage. And one reason" (he says) "much urged in the cases where an obligatory provision (gratuitous or not, but obligatory) was held to be satisfied by an after provision in a contract of marriage was that *debitur non præsumitur donare*, which is inapplicable in the case of a

(*a*) See the report, from which it appears that it was "held that the provision in the marriage contract was in satisfaction of the previous provision in the settlement." The settlement was "testamentary." 3 Sec. Ser. 89.

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first provision not obligatory." Then he says the distinction is applicable very weakly in the case of a first provision, even by will on a child, for that is in a sort onerous, the father being bound in morality at least to provide something. "But" (he says) "another and stronger reason is fully applicable to all cases of this kind, viz., that in marriage contracts the father is presumed to bring forward all that he means to give his child as that child's share of his property, in order to obtain better terms from the other contracting party. This is the reason chiefly insisted on in the decisions; and it is to be observed that it is the only reason which distinguishes these cases of marriage contract from cases of other provisions, where also the first provision is generally obligatory, and the maxim *debitor non præsumitur donare* is fully applicable, and where yet it is found that both provisions are due, contrary to what is found in the cases of marriage contract. This is the *ratio* too looked to by Stair, Bankton, and Erskine. Now this ratio is quite applicable to the case of a voluntary provision on a child, followed by a marriage contract."

It is said that the case of *Grant* v. *Anderson* was decided on some special grounds; and unfortunately it has been very much the habit, I am afraid too much the habit, on both sides of the Tweed to say we decide a case upon special grounds, when in truth you wish to shrink from the responsibility of laying down a more general rule. But I seek in vain for any special grounds in the case of *Grant* v. *Anderson*. It seems to me that if there was no such *primâ facie* presumption as appears to exist by the law of Scotland, the case was wrongly decided. I do not mean to say that it was wrongly decided, because, but for the difference of opinion that exists in this case, I should have thought it quite rightly decided according to the general law of Scotland.

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Then that case was followed very soon afterwards by the case of *Nimmo*, which is very important. That was a case which did not decide the very point, because the other two dispositions came in different order. The two dispositions that had to be considered were, first, the settlement upon the marriage contract; secondly, the provision that was made afterwards. The first settlement had been made in 1807 by Thomas Nimmo, binding his two trustees to pay to each of his five daughters 1,000*l.*, that is, 500*l.* at the end of one year, and 500*l.* at the end of five years after his death. Elizabeth, one of the daughters, married in 1825, and Nimmo, the father, then bound himself by her marriage contract to pay 1,000*l.* in the same way, that is, 500*l.* at the end of one year, and 500*l.* at the end of five years after his death, to be settled upon her and her family. In 1830 (whether he had forgotten the settlement of 1807 does not appear), he executed a new settlement, which, of course, got rid of the voluntary trust settlement of 1807, and by that new settlement he burthened his estate to pay 1,000*l.* to each of his daughters, including Elizabeth, to be settled in the same way. The question was, whether the daughter Elizabeth was entitled to take that subsequent provision as well as the provision that had been made for her on her marriage? It was held that she was not. This decision, indeed, was not by the universal concurrence of the Judges, but by three out of four. Lord *Meadowbank* dissented. But observe how he dissents. He says, "I have had no difficulty whatever in being of opinion that the tocher secured to Mrs. Smith" (that was Elizabeth) "by this contract superseded the provision made for her in the deed of 1807." That is, if the question had been between the marriage contract provision and the prior voluntary provision, he would have had no doubt that

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the marriage contract provision superseded the other He goes on to say, "and that had her father died at this period, she could only have been entitled to one sum of 1,000*l.*" He proceeds on this that the case was different when he made a subsequent provision; he thought that the doctrine did not then apply, but that the subsequent voluntary provision was to be taken as additional.

Lord *Moncrieff*, concurring with the majority of the Court, that the subsequent provision could not be claimed, says, "It is a settled point that if the contract is last, there is a presumption against duplication." It appears to me, therefore, that not only the institutional writers lay down this principle, but here we have one of the highest authorities in modern times, universally acknowledged to be so by Scotch lawyers, Lord *Moncrieff*, stating that it is a settled point that in that case the presumption is against duplication.

That, it is said does not mean what we understand by presumption, but only that you are to look at the circumstances of the case, in order from the whole context to discover the intention. In short, that it is *questio voluntatis*. My Lords, the one reason which leads me to the conclusion that that cannot be what any of these authorities meant is this, that if it was so there was no reason for saying anything at all upon the subject, because, whether you are speaking of tocher or of anything else, if *ex visceribus* of the instrument, as the Scotch lawyers say, you can discover that a later provision was meant to supersede a former, then without any special presumption or rule of law, the intention so discovered from the instrument itself must prevail.

Upon these grounds I am bound to state that the conclusion at which I should have arrived is that the

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minority of the Judges in the Court below in this case have come to a correct conclusion as to what was the general rule according to the Scotch law.

But then, my Lords, it is also said, and has been argued very forcibly indeed by the *Lord Advocate*, that if there had been such a presumption according to the Scotch law, like every other presumption it may be repelled, and that here there are circumstances which ought to lead your Lordships to say that it was repelled. It was said, first of all, compare this marriage contract of Mrs. Edmiston's with the previous marriage contract. I consider that to be a course which your Lordships cannot adopt. It cannot be consistent with the rules of evidence, either in Scotland or in England, that when you are merely construing the meaning of a particular contract, you should look to see what the maker of that contract, the person entering into it, may have done upon some other occasion. That is not allowable. My noble and learned friend made such reference for a different object. If there be such a presumption, as I should have thought there was by the law of Scotland, then the meaning of this contract must be ascertained with reference to what the law of Scotland was, and with reference to the existence of such a rule. And that being so, it is clear that you cannot look to any other document for the purpose of explaining that which must be explained by what is found within its own four corners. The truth is, if this presumption prevails, the statement that it shall be in satisfaction of previous provisions is unnecessary, and the fact that that has been stated in other instruments only shows, what is very commonly the case, that the testator had unnecessarily, though probably very wisely, (it would have obviated all discussion if he had done so here,) stated what

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would have been the rule of law if he had not so stated.

But then it is said that here there is no intention of making the daughters equal. That is clear. I think there was no intention that they should be equal. Great inequality appears upon the face of the documents, but the rule does not depend upon the provisions being equal. In some of the English cases, (I cannot say that I have examined them sufficiently to say in all,) there has been great inequality amongst the children that were to take. That inequality existed in the case of *Pym* v. *Lockyer* (*a*). The question is not whether the children were intended to be equally provided for, but whether the settlor or testator, the maker of the trust deed, has indicated in what proportions he chooses his different children to be provided for. In *Pym* v. *Lockyer*, which was a great case before Lord *Cottenham*, the legacies were not all of the same amount; but Lord *Cottenham* does not seem to have considered that as a matter of any importance. In expressing his opinion that the advance of a sum smaller than the legacy should only operate as satisfaction *pro tanto*, he says, "A father who makes his will, dividing his property amongst his children, must be supposed to have decided what under the then existing circumstances ought to be the portion of each child, not with reference to the wants of each, but attributing to each the share of the whole which, with reference to the wants of all, each ought to possess." Then he goes on to show that if he advances a less sum of money to any one child, that does not show any alteration in his intention as to the proportions in which they are to take, but only as to the certain portion that he meant to give by anticipa-

(*a*) 5 Myl. & Craig, 29.

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tion. He seems to assume that the circumstance of there being inequality in the objects of the testator does not interfere with the general application of the rule. Here, at the date of the marriage contract, the father had provided by his will and codicil for his three unmarried daughters in the proportions in which he thought that they ought to be benefited at his death. Then he gives to one of them a sum equal to what he had given by the trust deed. I respectfully ask, why is the presumption of ademption, (as we should call it in England, though it is a very inaccurate expression,) which it is admitted would have applied if the legacies had been equal, inapplicable because they were unequal? The subsequent variations are not material. By the marriage contract the provision for Margaret was gone; and the subsequent codicils only indicate the fluctuating intention of the testator as to the two remaining daughters.

It was argued that possibly the gift might be set up by the subsequent codicil, but I think that is unarguable. It was not very strongly pressed, because, as was pointed out in the case of *Powys* v. *Mansfield* (*a*), the effect of a codicil is only to set up the prior instrument so far as it was then operative, not to give it any effect which by law it had not at the time.

Then with regard to the circumstance that one settlement makes provision only for the children of the marriage, and the other for all the children, that has been often discussed upon grounds applicable as well to Scotland as to England, and it has been held, in the case of *Wharton* v. *Lord Durham* (*b*), that that is unimportant, that what you are to consider

(*a*) 6 Sim. 528 3; Myl. & Cra. 376.
(*b*) 3 Cla. & Finn. 146.

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is the amount which the father gives, what may be his reasons for giving it more or less strictly tied up in one case than in another is a matter which it is impossible for us to enter into or explain.

As to the suggestion that the testator evidently intended inequality by reason of the revocation of what he had given to his sons, I think it has been satisfactorily answered, and shown to be immaterial. He had given to one of his sons 2,000*l.*, subject to the deduction of anything that he might advance to him, and which should appear in his ledger; and also to the other son 6,000*l.* in the same way. Afterwards, to prevent any question, he says, as to the one who was to have 2,000*l.* :—"I have already advanced him 1,900*l.* and odd, which, with the interest, goes far beyond 2,000*l.*; therefore that will be found in my ledger, and I revoke all that I have said about the gift of 2,000*l.* to him. I desire that he may not be at all harassed or molested as to that which is a debt of more than 2,000*l.* appearing in my ledger." Again, in the same way with regard to the son to whom he had given 6,000*l.*, he says:—"I have advanced him that which I choose to call 2,000*l.*; that is to be cancelled, and his legacy is to be reduced to 4,000*l.*" These provisions seem to me to have no bearing upon the question.

Lord WENSLEYDALE:

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My Lords, the first question which arises in this case is, whether it is a rule of Scotch law that a provision of tocher by the marriage contract of a daughter is to be presumed *primâ facie* to be in satisfaction of former testamentary provisions in her favour?

It is not contended to be a *presumptio juris et de jure*, but a *primâ facie* presumption of fact, throwing

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the *onus probandi* on the party insisting on the contrary, and unless that *onus* is discharged by showing the balance of evidence to be against the presumption, it must prevail.

This question is of great importance in a general point of view, as every general rule is, which must, when established, be applied to all cases that come before the Court; though I must say that, on the view I take of the facts in this case, I am inclined to think it would not make any difference in my opinion, if it were established.

I conceive that by the law of Scotland there is no *primâ facie* presumption against double portions.

By the law of Scotland, a subsequent voluntary provision by a father given to a child, I conceive is, *primâ facie*, to be considered as not being a satisfaction of a former similar provision; there is no *primâ facie* presumption against double portions. But there is now established by the law of England, what is said to be an artificial rule, founded upon a leaning against double portions, that where a parent gives a legacy to a child, not stating the purposes with reference to which he gives it, the Court understands him as giving a portion, and if he afterwards advances a portion on the marriage of that child, it is to be deemed a satisfaction of the legacy (*a*). This rule is now, by a long course of decisions, firmly and fully established, and cannot be disputed, and any comment upon it would be worse than useless. It by no means follows, however, that because it has been adopted by the Courts in this part of the United Kingdom, it must be followed in another part. This case depends entirely on Scotch law. I have made a careful examination of the several authorities referred to by the Lords of Session in their full and elaborate judgments in the Court of Session, and quoted in the very able arguments at

(*a*) *Pye Dubost, Exparte*, 18 Ves. 140.

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I am not satisfied that there is any rule of the law of Scotland that a settlement on a daughter by a marriage contract is presumed to be a satisfaction of a previous provision unless that provision be *ex obligatione*.

your Lordships' bar, and I concur in the opinion of my noble and learned friend on the woolsack. I am not satisfied that there is any rule of the law of Scotland that a settlement on a daughter by a marriage contract is presumed to be a satisfaction of previous provisions for children, unless those provisions are *ex obligatione.*

There is certainly no decided case, in which such a rule is laid down, where the testamentary provisions are voluntary; and I am not satisfied that the passages cited from Erskine (*a*) and other text writers, which have been quoted, are anything more than illustrations of the general rule, *debitor non præsumitur donare.* It is quite true that observations are often made in the cases, as to the weight to be attached to a provision for tocher in a marriage settlement, when the question is, what was the intention of the parent?

In the case of *Dows* v. *Dow*, which was much relied upon, where the provision was not *ex obligatione*, it was stated (at the bar apparently) that tochers and contracts of marriage by the father, are ever presumed to be in satisfaction of all former provisions; for parents would never omit to accumulate their children's provisions in these contracts, that their reciprocal conditions might be better. This is not, I think, a statement of a rule of law, but an observation which, when made in contracts of that description, may be entitled to weight; the question being, as I conceive it always is, of the intention of the father in giving the portion. There is, however, an observation of the *Lord Justice Clerk* and the *Lord President* worthy of remark, that in such cases the father stipulates only for what he means to be *bound* to do, not for all he *may* do.

(*a*) B. 3, t. 3, sect. 93.

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The other cases which were cited seem to me to be of the same kind. The observation is made on the marriage settlement as evidence of intention, but those cases do not establish, that it is a rule of law that tochers and contracts of marriage constitute a *primâ facie* case of satisfaction. If there were a case of a portion by a testamentary instrument of a sum of 1,000*l.* to a daughter, and a marriage contract in which nothing more was stipulated than to give 1,000*l.* tocher to the wife, I am not satisfied that there is any rule of law in Scotland that one is to be taken *primâ facie* to be in satisfaction of the other; and that if there were no further evidence on either side, the decision of the Court ought to be in favour of the Defender. It is, I think, always a mere question of the actual intention of the father, and must be determined in each instance upon the whole evidence applicable to such a subject.

In England, if the case were to arise before a tribunal of which a jury formed a part, this question, I conceive, would be to be determined by them, subject to the construction of the terms of each written instrument by the Court. In our Courts of Equity, and in the Courts in Scotland, it would be the duty of Judges, exercising in this respect the functions of a jury, to decide the question of fact. It is obvious that decisions of such Courts upon a mere question of fact are comparatively of little value, as precedents to be followed; one case very seldom forming a satisfactory guide in another, any more indeed than the decision of one jury would be a binding authority for another.

The question then for us to decide is, whether we are satisfied that Mr. Kippen, by the marriage settlement of December 14th, 1850, giving his daughter Margaret 5,000*l.* as a tocher, meant thereby to satisfy

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the provisions he had made by his own marriage contract, of the 2nd of August 1815, for his children, which, in the result, amounted to 800*l.*, and the sum of 4,000*l.* which he provided by his voluntary trust disposition and settlement, of the 17th of July 1849, for each of his three daughters, Margaret, Jane, and Elizabeth.

As to the first provision of 800*l.* due *ex obligatione* under the onerous contract of Mr. Kippin's own marriage contract, the established rule of law applies, *debitor non præsumitur donare*, and Mr. and Mrs. Edmiston cannot have a legal claim for 800*l.* It must clearly be taken to be satisfied by the tocher. On this point all are agreed.

The question in the case is, whether the evidence shows that it was Mr. Kippen's intention that the 4,000*l.* should be satisfied by the provision in the marriage contract. Upon this question the Judges divided, eight being of opinion that he did not, and five that he did; giving their reasons most ably on both sides, and apparently exhausting the subject.

I have considered their reasons with great attention, and have satisfied myself that the majority are right, and that the truster, Mr. Kippen, did not mean the marriage tocher to be a satisfaction of the legacy.

The grounds upon which I have come to this conclusion are, first, that the marriage contract with Mr. Edmiston contains no clause of renunciation and discharge of her claims against her father; whereas in the previous settlements, on the marriage of Mr. Alston with Marianne Kippen on the 17th of June 1848, and of Mr. Shaw with Christina on the 12th of May 1849, there is contained a renunciation of "every provision, legal or conventional, competent to be made against William Kippen or his estate after his death." It must be considered, at all events, a very doubtful question of law, whether a contract of marriage was

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by law, *primâ facie* a satisfaction of a testamentary portion; and if Mr. Kippen meant that in this case the 5,000*l.* should be so, it cannot, I think, be doubted that he would have caused it to be inserted in the contract.

This difference between the deeds is attempted to be accounted for by the circumstance that a different law agent was employed to draw Mr. Edmiston's marriage contract, Mr. Kippen's son, a writer at Glasgow, having prepared the other two settlements. But I think we cannot attend to this. By whomsoever prepared, all the instruments must be taken to express the intention of the party to them; and it is a very strong circumstance, to show that he meant that it should not operate as a discharge, that one settlement contains no discharge, and the two others do.

It is to be observed that the suggestion made that he did not employ his son to draw the last settlement, because he did not like his son to know that he gave a larger portion to Mrs. Edmiston than to her other married sisters, is unfounded, for it appears that his son had failed in business, and was no longer acting as a writer at the time this marriage contract was prepared.

The second circumstance which weighs with me is, that after the alterations made by the second codicil (January the 6th, 1852) he confirms his first disposition and deed of settlement in all other respects, which *primâ facie* indicates his intention that the 4,000*l.* provided for Mrs. Edmiston therein should be paid. It is argued that if that provision had been already satisfied by the gift of a tocher of 5,000*l.* it would not be revived by this provision, as it certainly would not, by the law of England, according to the authority of *Powys* v. *Mansfield* (*a*). But in this case, which is one purely of intention, I can-

(*a*) 6 Sim. 528; 3 Myl. & Craig, 376.

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not help attributing more weight to that circumstance than my noble and learned friend on the woolsack, and my noble and learned friend opposite have done. Facts strike men's minds very differently. I own that it strikes mine as very strong evidence to show that he meant the settlement to be in force with reference to this 4,000*l.* The importance of the codicil seems to me to consist in this, that he notices his advance to William Kippen of near 2,000*l.*, and therefore revokes the bequest of 2,000*l.* given by the settlement to him; and he also notices his advance to his son George of 2,051*l.* 1*s.*, and therefore reduces the bequest of 6,000*l.* to him to 4,000*l.*, but takes no notice of the gift of 1,000*l.* which he had made to his daughter Margaret on her marriage in 1851, nor of his engagement to pay 4,000*l.* more. It is impossible he could have forgotten that transaction; and his confirmation of his trust disposition, in all other respects than as so altered is, I think, clearly a confirmation of the bequest to her of the 4,000*l.* It is true that by his trust disposition he provides for a deduction of monies advanced to William from the legacy of 2,000*l.*, and of all sums of money owing to him from George from the legacy of 6,000*l.*, and the legacy to William would, without the clause in the codicil, have been, according to the form of expression used in England, adeemed. But this appears to me very little, if at all; to weaken the force of the above observation, and the bequest to George would suffer a greater diminution that he has provided by the codicil by reason of the debt due from him being more than 2,000*l.*

I cannot help thinking, therefore, that the confirmation of the trust dispositions in other respects is very strong evidence indeed of the intention of Mr. Kippen to confirm the legacy of 4,000*l.*, notwithstanding the marriage settlement.

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These are the principal reasons which satisfy me as to the testator's intentions. I do not much rely on the difference of the provisions in the marriage settlement from the trust dispositions, because the marriage contract gives 1,000*l.* more than the settlement, which Mr. Kippen may have thought a compensation for the difference of the provision in other respects. Nor do I, on the other hand, place any reliance upon the circumstance that a father must be supposed to regard his children with equal affection and as equally entitled to his bounty. I agree entirely with the forcible and just observations of the *Lord Justice Clerk* against this being a right ground of judicial decision. If, indeed, we were to proceed on this supposition, it is impossible to reconcile with it the different provisions for the children, which, if we consider the marriage contract to be a satisfaction of the bequest, are obviously unequal.

I think, therefore, that the question in this case being clearly a question of fact, viz., of the intention of the father, the evidence is in favour of the marriage contract not being a satisfaction of the bequest. And I therefore concur with the majority of the learned Judges in the Court of Session, and with my noble and learned friend on the woolsack.

The LORD CHANCELLOR: I submit to your Lordships that in this case, considering it as a question of very great difficulty, in which a difference of opinion existed amongst the learned Judges below, and also exists amongst your Lordships, the costs of both parties should come out of the estate.

How far, when a judgment is affirmed, the question being one of admitted difficulty, costs are to be disallowed as against the Appellant.

Mr. *Anderson*: That, my Lord, would be no relief to me, because I am residuary legatee. I submit to your Lordships that there should be nothing said about costs. I think your Lordships have laid it down as a rule that when you differ among your-

selves, you affirm without costs. That question arose in the case of *Johnson* v. *Beattie* (*a*), where there was a difference of opinion in this House, and the rule was there laid down that the affirmance should be without costs.

The LORD CHANCELLOR: The Interlocutor will be affirmed without costs.

Lord CRANWORTH: In reference to what Mr. *Anderson* observed as to a supposed rule respecting costs, I must protest against that rule being the universal rule of the House.

Interlocutors appealed from, affirmed, and Appeal dismissed.

DODDS AND GREIG—MAITLAND AND GRAHAM.

(*a*) 10 Cla. & Finn. 153.